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ONTARIO LABOUR RELATIONS BOARD REPORTS



July 1986



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1986] OLRB REP. JULY

EDITOR: NIMAL V. DISSANAYAKE

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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CASES REPORTED

1. Colibri Construction Inc.; Re Labourers' Union, Local 527	931
2. Consbec Inc.; Re International Union of Operating Engineers, Local 793; Re Labourers' Union, Local 607	937
3. Dicognito, Rocco et al.; Re Retail, Wholesale and Department Store Union, Local 414 et al. and Dominion Stores Limited	938
4. Dominion Paving Limited; Re Labourers' Union, Local 183 and International Union of Operating Engineers, Local 793 and Amalgamated Transit Union, Local 113 and Michael Reilly et al.	946
5. Elgin Construction Company Limited; Re Labourers' Union, Ontario Provincial District Council; Re Group of Employees.....	951
6. Formula Plastics Inc.; Re Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers.....	954
7. Galil Electric Company Limited; Re I.B.E.W., Local 353	959
8. Halton Roman Catholic Separate School Board; Re Ontario Catholic Occasional Teachers' Association	962
9. Hamilton, General Contractors Association of, et al.; Re Carpenters Union, Local 18; Re Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America	969
10. Keytours Inc.; Re Service Employees Union, Local 210; Re Group of Employees	979
11. Lloyd-Truax Limited Wingham; Re Carpenters Union, Local 3054.....	994
12. Maplehurst Hospital Limited; Re C.L.A.C.; Re Group of Employees	996
13. Marks Lumber Ltd.; Re International Woodworkers of America	1004
14. Nepean Roof Truss Limited; Re Carpenters Union, Local 1030	1005
15. Northridge Plastics Limited; Re Canadian Brotherhood of Railway, Transport & General Workers	1012
16. Ontario Hydro - Darlington G.S. and the Electrical Power Systems Construction Association; Re Ontario Allied Construction Trades Council and L.I.U.N.A., Local 597.....	1014
17. Ottawa Catholic Separate School Board; Re Ontario Catholic Occasional Teachers' Association	1017
18. Smale Bros. Company Limited; Re Michael VanLandeghem; Re Labourers' Union, Local 1036.....	1019
19. Stuart, A.K.; Re O.P.S.E.U., Local 560	1021
20. Sunnybrook Foods Limited; Re U.F.C.W., Local 1000A	1024
21. Windsor Roman Catholic Separate School Board; Re Ontario Catholic Occasional Teachers' Association.....	1028

SUBJECT INDEX

- Adjournment - Certification - Construction Industry - Petition - Practice and Procedure - Statement of desire filed with no return mailing address of representative of employees - Acknowledgement of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing
- ELGIN CONSTRUCTION COMPANY LIMITED; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES 951
- Adjournment - Practice and Procedure - Unfair Labour Practice - Complaint relating to bargaining between employer and union - Employees only incidentally affected - Employees not entitled to notice - Request for adjournment to facilitate notice refused
- MARKS LUMBER LTD.; RE INTERNATIONAL WOODWORKERS OF AMERICA 1004
- Arbitration - Collective Agreement - Practice and Procedure - Unfair Labour Practice - Foremen performing bargaining unit work - Union arguing violation of s.50 of the Act - Whether matter proper for Board consideration - Board finding matter to be one of contract application and interpretation classically dealt with by arbitration - Board deferring matter to arbitration
- LLOYD-TRUAX LIMITED WINGHAM; RE CARPENTERS UNION, LOCAL 3054 .. 994
- Arbitration - Construction Industry Grievance - Practice and Procedure - Timeliness - Grievor claiming retroactive room-and-board allowance - Grievance launched with considerable delay - Board applying equitable doctrine of *laches* - Grievance dismissed
- ONTARIO HYDRO - DARLINGTON G.S. AND THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A., LOCAL 597 1014
- Arbitration - Construction Industry Grievance - Whether established local practice of carpenters performing "cutting and placing of lagging" work
- HAMILTON, GENERAL CONTRACTORS ASSOCIATION OF, ET AL.; RE CARPENTERS UNION, LOCAL 18; RE ONTARIO PROVINCIAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA..... 969
- Bargaining Rights - Certification - Whether occasional teachers fall within bargaining unit for which another trade union already had bargaining rights - Position of occasional teachers under Bill 100 - Appropriate bargaining unit for occasional teachers
- WINDSOR ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION 1028
- Bargaining Rights - Employee - Termination - Applicant not at work on application date and not an employee - No status to bring termination application
- SMALE BROS. COMPANY LIMITED; RE MICHAEL VANLANDEGHEM; RE LABOURER'S UNION, LOCAL 1036 1019
- Bargaining Unit - Bargaining Rights - Certification - Whether occasional teachers fall within bargaining unit for which another trade union already had bargaining rights - Position of occasional teachers under Bill 100 - Appropriate bargaining unit for occasional teachers
- WINDSOR ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION 1028

II

Bargaining Unit - Certification - Representation Vote - Termination - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate	
SUNNYBROOK FOODS LIMITED; RE U.F.C.W., LOCAL 1000A	1024
Build-Up - Certification - Construction Industry - Employee - Reconsideration - Whether "Thirty-thirty" rule and build-up principle applied in construction industry certification applications - Whether Board should order hearing	
COLIBRI CONSTRUCTION INC.; RE LABOURERS' UNION, LOCAL 527	931
Certification - Adjournment - Construction Industry - Petition - Practice and Procedure - Statement of desire filed with no return mailing address of representative of employees - Acknowledgment of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing	
ELGIN CONSTRUCTION COMPANY LIMITED; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES	951
Certification - Bargaining Rights - Bargaining Unit - Whether occasional teachers fall within bargaining unit for which another trade union already had bargaining rights - Position of occasional teachers under Bill 100 - Appropriate bargaining unit for occasional teachers	
WINDSOR ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION	1028
Certification - Bargaining Unit - Representation Vote - Termination - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate	
SUNNYBROOK FOODS LIMITED; RE U.F.C.W., LOCAL 1000A	1024
Certification - Build-Up - Construction Industry - Employee - Reconsideration - Whether "Thirty-thirty" rule and build-up principle applied in construction industry certification applications - Whether Board should order hearing	
COLIBRI CONSTRUCTION INC.; RE LABOURERS' UNION, LOCAL 527	931
Certification - Construction Industry - Employee - Grievors laid-off before reporting to work on morning of the date of the application - Whether grievors should be included in count - Whether construction industry test "actually at work on date of application" satisfied	
GALIL ELECTRIC COMPANY LIMITED; RE I.B.E.W., LOCAL 353.....	959
Certification - Practice and Procedure - Representation Vote - Board requiring filing of fresh Form 9 declaration when membership evidence transferred from one certification application to another - Failure to file Form 9 does not prevent Board acting on "appearance" created by applications for membership cards and receipts - Failure only fatal when application comes on for hearing - Appropriateness of conducting mail ballot in occasional teachers' constituency	
HALTON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION	962

Certification - Practice and Procedure - Representation Vote - Form 9 signed “for” declarant by another individual - Whether acceptable - Proper Form 9 required to be filed at time Board determines membership support - Only appearance of support required to direct pre-hearing vote - Proper Form 9 can be filed after vote	
NORTHRIDGE PLASTICS LIMITED; RE CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT & GENERAL WORKERS	1012
Certification - Representation Vote - Pre-hearing vote ordered in a constituency of occasional teachers - Whether vote should be conducted by mail	
OTTAWA CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS’ ASSOCIATION	1017
Certification - Unfair Labour Practice - Applicant requesting s.8 certification for full-time bargaining unit after lost representation vote - Settlement reached on s.89 complaint - Board concluding first vote influenced by unfair labour practices - Whether new vote should be ordered or applicant certified outright - Whether true wishes likely to be ascertained in representation vote - Settlement not enough to “restore the atmosphere” - Board exercising discretion to certify pursuant to s.8	
MAPLEHURST HOSPITAL LIMITED; RE C.L.A.C.; RE GROUP OF EMPLOYEES	996
Charter - Picketing - Strike - Union members refusing to cross picket line at Toronto Transit Commission job site - Whether <i>Transit Labour Disputes Act</i> violates s.2(d) of Charter - Constitutional challenge not entertained in absence of notice to Attorney General - Whether Board has jurisdiction to entertain s.89 complaint for alleged violation of <i>Transit Labour Disputes Act</i>	
DOMINION PAVING LIMITED; RE LABOURERS’ UNION, LOCAL 183 AND INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 AND AMALGAMATED TRANSIT UNION, LOCAL 113 AND MICHAEL REILLY ET AL.	946
Collective Agreement - Arbitration - Practice and Procedure - Unfair Labour Practice - Foremen performing bargaining unit work - Union arguing violation of s.50 of the Act - Whether matter proper for Board consideration - Board finding matter to be one of contract application and interpretation classically dealt with by arbitrators - Board deferring matter to arbitration	
LLOYD-TRUAX LIMITED WINGHAM; RE CARPENTERS UNION, LOCAL 3054 ..	994
Colleges Collective Bargaining Act - Duty of Fair Representation - Financial Statements - Unfair Labour Practice - Local union membership policy not to provide financial statement to employees - Employee permitted access to financial information - Access to information not adequate for purposes of Act - Union donation of funds to other organizations contrary to union constitution not breach of duty of fair representation - Purely internal union matter	
STUART, A.K.; RE O.P.S.E.U., LOCAL 560	1021
Constitutional Law - Company engaged in business of setting up and marketing air and rail tour packages - Tours sold on a wholesale basis to Ontario and U.S. travel agents - Some tours leave from U.S. to destinations in Ontario and outside Ontario - Business requiring some employees to travel outside Ontario on regular basis - Out-of-province services provided by persons other than employees of company - Whether business integral part of federal work or undertaking - Whether itself an “extra-provincial” work or undertaking - Whether “connecting” or “extending” beyond the province	
KEYTOURS INC.; RE SERVICE EMPLOYEES UNION, LOCAL 210; RE GROUP OF EMPLOYEES	979

IV

Construction Industry - Adjournment - Certification - Petition - Practice and Procedure - Statement of desire filed with no return mailing address of representative of employees - Acknowledgment of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing	
ELGIN CONSTRUCTION COMPANY LIMITED; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES	951
Construction Industry - Build-Up - Certification - Employee - Reconsideration - Whether "Thirty-thirty" rule and build-up principle applied in construction industry certification applications - Whether Board should order hearing	
COLIBRI CONSTRUCTION INC.; RE LABOURERS' UNION, LOCAL 527	931
Construction Industry - Certification - Employee - Grievors laid-off before reporting to work on morning of the date of the application - Whether grievors should be included in count - Whether construction industry test "actually at work on date of application" satisfied	
GALIL ELECTRIC COMPANY LIMITED; RE I.B.E.W., LOCAL 353.....	959
Construction Industry Grievance - Arbitration - Practice and Procedure - Timeliness - Grievor claiming retroactive room-and-board allowance - Grievance launched with considerable delay - Board applying equitable doctrine of <i>laches</i> - Grievance dismissed	
ONTARIO HYDRO - DARLINGTON G.S. AND THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A., LOCAL 597	1014
Construction Industry Grievance - Arbitration - Whether established local practice of carpenters performing "cutting and placing of lagging" work	
HAMILTON, GENERAL CONTRACTORS ASSOCIATION OF, ET AL.; RE CARPENTERS UNION, LOCAL 18; RE ONTARIO PROVINCIAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.....	969
Duty of Fair Representation - Colleges Collective Bargaining Act - Financial Statements - Unfair Labour Practice - Local union membership policy not to provide financial statement to employees - Employee permitted access to financial information - Access to information not adequate for purposes of Act - Union donation of funds to other organizations contrary to union constitution not breach of duty of fair representation - Purely internal union matter	
STUART, A.K.; RE O.P.S.E.U., LOCAL 560	1021
Duty of Fair Representation - Unfair Labour Practice - Agreement between Dominion Stores and union relating to proposed lay-offs of warehouse employees - Laid-off employees' grievances not taken to arbitration by union - Union's decision based on refusal to disturb agreement - Whether breach of duty of fair representation - Whether union's decision not to take a bad faith bargaining complaint against employer amounting to breach of duty - Whether union breached duty by not letting complainant-steward represent group of grievors on his own	
DICOGNITO, ROCCO ET AL.; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414 ET AL. AND DOMINION STORES LIMITED	938
Duty to Bargain in Good Faith - First Contract Arbitration - Parties able to agree on most substantive provisions - Union making substantial economic concessions - Analysis of s.40a(2) - Whether employer's insistence on three-year term for contract and refusal to recognize	

seniority rights without reasonable justification - Board directing settlement of first collective agreement by arbitration	
NEPEAN ROOF TRUSS LIMITED; RE CARPENTERS UNION, LOCAL 1030	1005
Duty to Bargain in Good Faith - Unfair Labour Practice - Employer insisting on clause allowing employer to discharge with or without cause - "Process" of collective bargaining not showing employer bad faith - Whether content of proposed clause <i>per se</i> violation of s.15	
FORMULA PLASTICS INC.; RE CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS.....	954
Employee - Bargaining Rights - Termination - Applicant not at work on application date and not an employee - No status to bring termination application	
SMALE BROS. COMPANY LIMITED; RE MICHAEL VANLANDEGHEM; RE LABOURERS' UNION, LOCAL 1036	1019
Employee - Build-Up - Certification - Construction Industry - Reconsideration - Whether "Thirty-thirty" rule and build-up principle applied in construction industry certification applications - Whether Board should order hearing	
COLIBRI CONSTRUCTION INC.; RE LABOURER'S UNION, LOCAL 527	931
Employee - Certification - Construction Industry - Grievors laid-off before reporting to work on morning of the date of the application - Whether grievors should be included in count - Whether construction industry test of "actually at work on date of application" satisfied	
GALIL ELECTRIC COMPANY LIMITED; RE I.B.E.W., LOCAL 353.....	959
Financial Statements - Colleges Collective Bargaining Act - Duty of Fair Representation - Unfair Labour Practice - Local union membership policy not to provide financial statement to employees - Employee permitted access to financial information - Access to information not adequate for purposes of Act - Union donation of funds to other organizations contrary to union constitution not breach of duty of fair representation - Purely internal union matter	
STUART, A.K.; RE O.P.S.E.U., LOCAL 560	1021
First Contract Arbitration - Duty to Bargain in Good Faith - Parties able to agree on most substantive provisions - Union making substantial economic concessions - Analysis of s.40a(2) - Whether employer's insistence on three-year term for contract and refusal to recognize seniority rights without reasonable justification - Board directing settlement of first collective agreement by arbitration	
NEPEAN ROOF TRUSS LIMITED; RE CARPENTERS UNION, LOCAL 1030	1005
Membership Evidence - Principal of employer advising employee of forthcoming visit by union rep - Urging employee to sign card - All cards filed not given weight in absence of evidence that incident isolated	
CONSBEC INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE LABOURERS' UNION, LOCAL 607	937
Petition - Adjournment - Certification - Construction Industry - Practice and Procedure - Statement of desire filed with no return mailing address of representative of employees - Acknowledgment of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing	
ELGIN CONSTRUCTION COMPANY LIMITED; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES	951

VI

Picketing - Charter - Strike - Union members refusing to cross picket line at Toronto Transit Commission job site - Whether <i>Transit Labour Disputes Act</i> violates s.2(d) of Charter - Constitutional challenge not entertained in absence of notice to Attorney General - Whether Board has jurisdiction to entertain s.89 complaint for alleged violation of <i>Transit Labour Disputes Act</i>	
DOMINION PAVING LIMITED; RE LABOURERS' UNION, LOCAL 183 AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND AMALGAMATED TRANSIT UNION, LOCAL 113 AND MICHAEL REILLY ET AL.	946
Practice and Procedure - Adjournment - Certification - Construction Industry - Petition - Statement of desire filed with no return mailing address of representative of employees - Acknowledgment of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing	
ELGIN CONSTRUCTION COMPANY LIMITED; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES	951
Practice and Procedure - Adjournment - Unfair Labour Practice - Complaint relating to bargaining between employer and union - Employees only incidentally affected - Employees not entitled to notice - Request for adjournment to facilitate notice refused	
MARKS LUMBER LTD.; RE INTERNATIONAL WOODWORKERS OF AMERICA	1004
Practice and Procedure - Arbitration - Collective Agreement - Unfair Labour Practice - Foremen performing bargaining unit work - Union arguing violation of s.50 of the Act - Whether matter proper for Board consideration - Board finding matter to be one of contract application and interpretation classically dealt with by arbitrators - Board deferring matter to arbitration	
LLOYD-TRUAX LIMITED WINGHAM; RE CARPENTERS UNION, LOCAL 3054 ..	994
Practice and Procedure - Arbitration - Construction Industry Grievance - Timeliness - Grievor claiming retroactive room-and-board allowance - Grievance launched with considerable delay - Board applying equitable doctrine of <i>laches</i> - Grievance dismissed	
ONTARIO HYDRO-DARLINGTON G.S. AND THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A., LOCAL 597	1014
Practice and Procedure - Certification - Representation Vote - Board requiring filing of fresh Form 9 declaration when membership evidence transferred from one certification application to another - Failure to file Form 9 does not prevent Board acting on "appearance" created by applications for membership cards and receipts - Failure only fatal when application comes on for hearing - Appropriateness of conducting mail ballot in occasional teachers' constituency	
HALTON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION	962
Practice and Procedure - Certification - Representation Vote - Form 9 signed "for" declarant by another individual - Whether acceptable - Proper Form 9 required to be filed at time Board determines membership support - Only appearance of support required to direct pre-hearing vote - Proper Form 9 can be filed after vote	
NORTHRIDGE PLASTICS LIMITED; RE CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT & GENERAL WORKERS	1012
Reconsideration - Build-Up - Construction Industry - Employee - Whether "Thirty-thirty" rule	

and build-up principle applied in construction industry certification applications - Whether Board should order hearing	
COLIBRI CONSTRUCTION INC.; RE LABOURERS' UNION, LOCAL 527	931
Representation Vote - Bargaining Unit - Certification - Termination - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate	
SUNNYBROOK FOODS LIMITED; RE U.F.C.W., LOCAL 1000A	1024
Representation Vote - Certification - Practice and Procedure - Board requiring filing of fresh Form 9 declaration when membership evidence transferred from one certification application to another - Failure to file Form 9 does not prevent Board acting on "appearance" created by applications for membership cards and receipts - Failure only fatal when application comes on for hearing - Appropriateness of conducting mail ballot in occasional teachers' constituency	
HALTON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION	962
Representation Vote - Certification - Practice and Procedure - Form 9 signed "for" declarant by another individual - Whether acceptable - Proper Form 9 required to be filed at time Board determines membership support - Only appearance of support required to direct pre-hearing vote - Proper Form 9 can be filed after vote	
NORTHBRIDGE PLASTICS LIMITED; RE CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT & GENERAL WORKERS	1012
Representation Vote - Certification - Pre-hearing vote ordered in a constituency of occasional teachers - Whether vote should be conducted by mail	
OTTAWA CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION	1017
Strike - Charter - Picketing - Union members refusing to cross picket line at Toronto Transit Commission job site - Whether <i>Transit Labour Disputes Act</i> violates s.2(d) of Charter - Constitutional challenge not entertained in absence of notice to Attorney General - Whether Board has jurisdiction to entertain s.89 complaint for alleged violation of <i>Transit Labour Disputes Act</i>	
DOMINION PAVING LIMITED; RE LABOURERS' UNION, LOCAL 183 AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND AMALGAMATED TRANSIT UNION, LOCAL 113 AND MICHAEL REILLY ET AL.	946
Termination - Bargaining Rights - Employee - Applicant not at work on application date and not an employee - No status to bring termination application	
SMALE BROS. COMPANY LIMITED; RE MICHAEL VANLANDEGHEM; RE LABOURERS' UNION, LOCAL 1036	1019
Termination - Bargaining Unit - Certification - Representation Vote - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level	

VIII

of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate	
SUNNYBROOK FOODS LIMITED; RE U.F.C.W., LOCAL 1000A	1024
Timeliness - Arbitration - Construction Industry Grievance - Practice and Procedure - Grievor claiming retroactive room-and-board allowance - Grievance launched with considerable delay - Board applying equitable doctrine of <i>laches</i> - Grievance dismissed	
ONTARIO HYDRO - DARLINGTON G.S. AND THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A., LOCAL 597	1014
Unfair Labour Practice - Adjournment - Practice and Procedure - Complaint relating to bargaining between employer and union - Employees only incidentally affected - Employees not entitled to notice - Request for adjournment to facilitate notice refused	
MARKS LUMBER LTD.; RE INTERNATIONAL WOODWORKERS OF AMERICA	1004
Unfair Labour Practice - Arbitration - Collective Agreement - Practice and Procedure - Foremen performing bargaining unit work - Union arguing violation of s.50 of the Act - Whether matter proper for Board consideration - Board finding matter to be one of contract application and interpretation classically dealt with by arbitrators - Board deferring matter to arbitration	
LLOYD-TRUAX LIMITED WINGHAM; RE CARPENTERS UNION, LOCAL 3054 ..	994
Unfair Labour Practice - Certification - Applicant requesting s.8 certification for full-time bargaining unit after lost representation vote - Settlement reached on s.89 complaint - Board concluding first vote influenced by unfair labour practices - Whether new vote should be ordered or applicant certified outright - Whether true wishes likely to be entertained in representation vote - Settlement not enough to "restore the atmosphere" - Board exercising discretion to certify pursuant to s.8	
MAPLEHURST HOSPITAL LIMITED; RE C.L.A.C.; RE GROUP OF EMPLOYEES	996
Unfair Labour Practice - Colleges Collective Bargaining Act - Duty of Fair Representation - Financial Statements - Local union membership policy not to provide financial statement to employees - Employee permitted access to financial information - Access to information not adequate for purposes of Act - Union donation of funds to other organizations contrary to union constitution not breach of duty of fair representation - Purely internal union matter	
STUART, A.K.; RE O.P.S.E.U., LOCAL 560	1021
Unfair Labour Practice - Duty of Fair Representation - Agreement between Dominion Stores and union relating to proposed lay-offs of warehouse employees - Laid-off employees' grievances not taken to arbitration by union - Union's decision based on refusal to disturb agreement - Whether breach of duty of fair representation - Whether union's decision not to take a bad faith bargaining complaint against employer amounting to breach of duty - Whether union breached duty by not letting complainant-steward represent group of grievors on his own	
DICOGNITO, ROCCO ET AL.; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414 ET AL. AND DOMINION STORES LIMITED	938
Unfair Labour Practice - Duty to Bargain in Good Faith - Employer insisting on clause allowing	

employer to discharge with or without cause - "Process" of collective bargaining not showing employer bad faith - Whether content of proposed clause *per se* violation of s.15

FORMULA PLASTICS INC.; RE CANADIAN UNION OF UNITED BREWERY,
FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS.....

0156-86-R Labourers' International Union of North America Local 527, Applicant, v. Colibri Construction Inc., Respondent

Build-Up - Certification - Construction Industry - Employee Reconsideration - Whether "Thirty-Thirty" rule and build-up principle applied in construction industry certification applications - Whether Board should order hearing

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

DECISION OF THE BOARD; July 23, 1986

1. The Board issued a decision dated May 16, 1986, certifying the applicant on its own behalf and on behalf of all of the affiliated bargaining agents of the labourers designated employee bargaining agency to represent in collective bargaining all construction labourers employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The Board also certified the applicant to represent in collective bargaining all construction labourers employed by the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell. The decision was issued without a hearing pursuant to the Board's discretion under section 102(14) of the *Labour Relations Act*, in spite of a request contained in the reply that the Board hold a hearing. The reasons given by the respondent in support of the request were that the respondent wished to adduce evidence and make submissions on its claim that the Board should direct the taking of a deferred representation vote because the number of employees in the bargaining unit at the making of the application was not representative of the employees who would ultimately be employed in it. Details of the request are set out in paragraph 7 of the Board's decision. The Board's reasons for not granting the request are contained in paragraphs 8 and 9.

2. The Board has received a letter dated June 30th, 1986 from the respondent's solicitors requesting the Board to reconsider its decision certifying the applicant, to hold a hearing into the application and direct that a representation vote be held pursuant to section 7(2) of the Act. The full text of the letter is set out hereunder:

On behalf of the Respondent Colibri Construction Inc., we would request that the Ontario Labour Relations Board reconsider its decision of May 16, 1986 pursuant to Section 106(1) of the *Labour Relations Act*.

1. MATERIAL FACTS

- On April 15, 1986 the Applicant union filed an application for certification as the bargaining agent for employees of the Respondent company.
2. On April 28, 1986 the Respondent company filed a reply to the above application, in which the Respondent's officer, Catherine Morisset certified that four persons were employed in the proposed bargaining unit on April 15, 1986.
3. On April 15, 1986 three of the four employees were at work in the bargaining unit. The fourth employee, Mario Lachapelle, was absent from work on personal leave from April 14th to April 27th inclusive.
4. The employee, Mario Lachapelle, was present at work in the bargaining unit from April 2nd to April 13th and from April 28th to the present.
5. On April 28, 1986, the terminal date fixed by the Board for the application, two of

the four persons employed in the bargaining unit were members of the Applicant union.

6. On April 28, 1986 the Respondent company stated in its reply to the application that it had or was anticipating to have contracts for three construction projects in Ottawa with the result that the work force in the proposed bargaining unit was expected to increase from four (4) to approximately twenty-five (25) employees by the end of May, 1986.
7. On May 16, 1986 the Board certified the Applicant union as the bargaining agent for all construction labourers in the employ of the Respondent company in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, except for non-working foremen and persons above that rank.
8. As of June 30, 1986 the Respondent company has hired 15 employees in the bargaining unit to carry out work on the three above-mentioned contracts. The term of employment of these employees is expected to be one year.

SUBMISSIONS

We submit that the Board should reconsider its decision of May 16, 1986 for the following reasons:

1. The Board erred in failing to consider for purposes of the employee count that four persons and not three were members of the bargaining unit on April 15, 1986. The Board failed to follow its long standing policy of applying the "30/30" rule to determine the number of employees at work as of the application date. According to this rule, "where employees are not at work in the unit at the application date, they are nonetheless considered employees if they worked in the unit at any time during the 30-day period prior to the application date *and* return to work or are expected to return to work in the unit at any time within the 30 days following the application date". (Sack and Mitchell, *Ontario Labour Relations Board Law and Practice* (1985) at 3:1620; *Indusmin Ltd.* [1981] O.L.R.B. Rep. Dec. 1790; *Brewers Nursing Home* [1981] O.L.R.B. Rep. July 852.

In the above matter, the Board erred by not applying the "30/30" rule to find as a matter of fact that Mario Lachapelle was an employee for the purpose of the count on April 15, 1986. As a result the Board wrongly concluded that the union represented 66% of the bargaining (2 out of 3) rather than 50% (2 out of 4), and so inaccurately applied sub-section 7(2) of the Act and issued a certificate to the Applicant union without ordering a representation vote. Had the Board correctly calculated the union's representation, the outcome, as far as a representation vote is concerned, would have been quite different.

We, therefore, submit that the Board should exercise its discretion to reconsider its decision pursuant to sub-section 106(1) of the Act because the Board erred in fact, and because the Respondent employer did not have the opportunity to make submissions on the Board policy of applying the "30/30" rule. (*Art Gallery of Ontario* [1980] O.L.R.B. Rep. Feb. 140.)

2. The Board failed to exercise its discretion under sub-section 119(2) of the Act to order a delay in the holding of a representation vote where the employer shows that a substantial increase in the size of the bargaining unit is expected. Although the Board has a policy of only rarely using its discretion under sub-section 119(2) to take account of an expected build up in the construction industry, we submit that the Board should have exercised its discretion in the above case.

The Board's policy is to balance the need for certainty and finality in the construction industry which is subject to cyclical fluctuations of the work force, with the principle of permitting a representative proportion of the bargaining unit to have a voice in choosing the bargaining unit. To determine whether the existing group is sufficiently

representative of the expected total bargaining unit, the Board looks at whether the number employed on the application date constitutes more than 50% of the anticipated total. If less than 50% is employed on that date, it is normally felt that the group is not sufficiently representative and that the certification decision should be delayed until a more representative group has been hired. (*F. Lepper & Son* [1977] O.L.R.B. Rep. Dec. 846; *Woodbridge Foam Corp.* [1985] O.L.R.B. Rep. Jan. 139; *Indusmin Ltd.* [1981] O.L.R.B. Rep. Dec. 1790; *J. G. Fitzpatrick Construction Ltd.* [1972] O.L.R.B. Rep. May 485 *Industrial Mine Installations Ltd.* [1968] O.L.R.B. Rep. May 217.)

We submit that in the above matter the Board should have given priority to the principle of representation given that at the application date less than 50% of the projected bargaining unit was in place and the number of employees present at work and able to exercise their franchise was disproportionately small (4 of 25). We further submit that no prejudice would be caused to either party if the Board were to order a representation vote immediately. At present more than 50% of the proposed unit is in place (15 of 25). The Respondent company has realised it plans to carry out the proposed contracts and no collective agreement has yet been concluded between the parties.

For all the above reasons, we request that the Board reconsider its decision and order a representation vote to be held with immediate effect.

3. As a result of the aforementioned issues, we submit that the Board should exercise its discretion under sub-section 102(4) of the Act to order a hearing of the application for certification in order to permit the Respondent company to present evidence in support of its assertions and to make submissions.

RELIEF SOUGHT

In conclusion, and for the foregoing reasons, the Respondent company requests the following:

1. that the Board reconsider its decision of May 16, 1986;
2. that the Board order a hearing of the certification application;
3. that the Board order that a representation vote be held pursuant to sub-section 7(2) of the Act.

3. Most of the material facts asserted in the request for reconsideration were either findings of fact made by the Board based on the pleadings before it or facts which had been asserted in the reply filed by the respondent and assumed, for purposes of the Board's decision, to be true (see paragraphs 8 and 9 of the decision). The exceptions are the detailed references to Mario Lachapelle in items 3 and 4 of the material facts and the reference in the last sentence of item 8 that the term of employment for employees in the bargaining unit as of June 30, 1986 was expected to be one year.

4. Similarly, the submissions made in support of the request for reconsideration deal with matters already taken into account by the Board in its May 16th decision when it assumed the facts asserted in paragraph 13 of the reply to be true and gave its reasons why, on the asserted facts, it was exercising its discretion under the Act to not hold a hearing into the application and to not have any regard to any increase in the number of employees after the application date. The Board did not deal explicitly with its "30/30" rule and whether, as the respondent argues in submission #1, the rule should have been applied in deciding the number of employees in the bargaining unit. This is because the Board had followed its policy and consistent practice in construction industry certification applications of counting only persons actually at work in the bargaining unit on the

application date for deciding the number of employees in the unit. By implication, that policy and practice excludes use of the “30/30” rule.

5. Where the Board does apply the “30/30” rule in applications for certification, it looks to the fact of employment during the 30 days immediately prior to the application date *and* the 30 days immediately following the application date. Persons who have worked in the bargaining unit sometime during the defined period prior to the application date and the defined period after it, are considered by the Board to be employees for purposes of determining the number of employees in the unit as of the application date. The Board’s decision in *Sydenham District Hospital*, [1967] OLRB Rep. May 135 explains the underlying rationale of the rule as having the effect of excluding persons absent during the union’s organization campaign and those persons unlikely to return to work, and of allowing the parties to ascertain, in advance of a hearing, which persons will be dealt with by the Board. This rule has been applied by the Board to non-construction applications for certification with a consistency which has established a substantial measure of certainty for the parties in knowing prior to any hearing which persons the Board will find to be in the proposed bargaining unit. The Board has just as consistently not applied the rule to construction industry applications for certification. See, for example, the Board’s decision in *Bertrand & Frere Construction Co. Limited*, [1965] OLRB Rep. July 292. The Board applied the “30/30” rule in that case in making a finding that certain persons who are on lay-off when the application was made were not employees in the bargaining unit for purposes of the count. The employer requested the Board to reconsider its finding and, instead, find that they were employees on the grounds that the employer’s business was in the construction industry and the Board should have given account to the seasonal nature of the industry. The Board declined to do so. It is clear from the Board’s response quoted below that it was the Board’s policy at the time to not apply the “30/30” rule in certification applications in the construction industry. Rather, the Board’s rule in construction cases was to count only those persons in the employ of the employer on the actual date of application.

We would mention that it was not suggested by counsel for the respondent that the respondent is an “employer” operating a business in the construction industry as defined in section 90(A) [now section 117(c)] of The Labour Relations Act. In any event, the application was not made under the construction industry sections (sections 90 to 96) [now sections 117 to 151] of The Labour Relations Act. We would point out that if, in fact, the applicant had been entitled to make its application under the construction industry sections of the Act and had done so, the practice of the construction industry division of the Board is to include in the bargaining unit for the purposes of the count only those employees who are in the employ of the employer *on the actual date of the making of the application*.

[emphasis in original]

The rationale for the rule for construction applications relates to the nature of the employment relationship in the construction industry. See, for example, the Board’s decision in *Polmar Tile Company*, [1970] OLRB Rep. Apr. 50. That is still the Board’s rule for applications for certification in the construction industry today and the rule applied by the Board in the instant case in determining that there were three employees in the bargaining unit at the time the application was made. This rule clearly excludes Mario Lachapelle named in items 3 and 4 of the material facts alleged in the request for reconsideration.

6. Whereas application of the Board’s “30/30” rule in non-construction applications has been the source of certainty for the parties in ascertaining prior to any hearing which employees the Board is likely to include in the bargaining unit sought in the application, in construction industry applications it has been the rule expressed by the emphasized words in the quotation from the Board’s decision in *Bertrand & Frere*, *supra*. Some sense of the importance which the Board has

attached to certainty in the construction industry applications is gained from a reading of its decision in *Industrial-Mine Installations Limited*, [1968] OLRB Rep. May 217 at paragraphs 9 and 10, a case cited by respondent's solicitor in support of its submissions that the Board should consider the "build-up" factor in the instant application. See also the cases referred to in the dissent to the majority decision in that case, particularly, the quote in paragraph 2 therefrom respecting the Board's decision in *Keystone Contractors Limited*, [1966] OLRB Rep. Feb. 821.

7. The request for reconsideration does not offer any compelling reason why the Board should abandon its rule consistently applied in construction industry cases in favour of the "30/30" rule which it just as consistently has not applied in construction industry certification applications. Accordingly, the Board will not apply the "30/30" rule in the circumstances of the material facts alleged by the respondent in its reply and in its request for reconsideration. The Board, therefore, reaffirms its finding that there were three employees of the respondent in the bargaining unit on the date of making of the application and that more than fifty-five per cent of those persons were members of the applicant on the terminal date fixed for this application.

8. Submission #2 in the letter requesting reconsideration is that the Board should have used its discretion under section 119(2) of the Act to not certify the applicant without a representation vote and instead to defer the taking of a representation vote until a representative group of employees had been hired by the respondent. The Board dealt fully in its decision at paragraphs 8 and 9 with that issue. The Board clearly has exercised its discretion to not give any weight to accretions to the number of employees in the bargaining unit after the application date and has given its reasons for doing so. The factual basis for the Board's decision was the facts asserted in paragraph 13 of the respondent's reply to the application, all of which were assumed by the Board to be true. It is evident from the Board's decision that it has attached greater importance to the need for the parties in construction industry certification applications to know with reasonable certainty which employees the Board will find to be in the bargaining unit than it has given to the need for future employees to have a voice in choosing their bargaining agent. Since most construction industry applications for certification are processed without a hearing, it might be said that there is greater need for certainty about who will be found by the Board to be employees in the unit than is the case in non-construction applications. In that respect, any planned build-up is inherently an uncertain situation. That is one of the reasons why the Board sets the kind of stringent conditions outlined at paragraph 10 of its decision in *F. Lepper & Son*, [1977] OLRB Rep. Dec. 846, another of the authorities cited by the respondent in support of submission #2. The Board must be reasonably assured that the build-up will be realized. The instant case demonstrates the problem of uncertainty. The respondent anticipated that it would win certain contracts and that anticipation was the basis of the respondent's expectation its workforce would increase to 25 by the end of May 1986. This was one of the facts assumed by the Board to be true for purposes of its May 16th decision. One of the material facts set out in the reconsideration letter and assumed by the Board to be true is that there were only 15 employees employed in the bargaining unit at June 30th, 1986. Clearly, the expected build-up target was not realized.

9. The respondent's solicitors have correctly acknowledged the fact that the Board has rarely used its section 119(2) discretion to give account to an expected build-up in the number of employees in the bargaining unit after the application date. Except in very unique circumstances, the Board has followed the rule of determining the number of employees in the bargaining unit to be the employees actually at work in the unit on the date of the application and it has refused to take into account either diminution or accretion after the application date. This is particularly clear from the reasoning and conclusions set out in both the majority decision and in the authorities cited in the dissent in the *Industrial-Mine* decision, *supra*. In that case, the Board did take into account circumstances analogous to a build-up and directed that a representation vote be held. The

only reported decision of the Board where it has exercised its discretion under section 119(2) of the Act to pay heed to the build-up principle in a construction industry application for certification was in *J. G. Fitzpatrick Construction Ltd.*, [1972] OLRB Rep. May 485. The respondent has cited both decisions in support of its submission that the Board should have applied the build-up principle in the instant case. The Board's May 16th decision distinguishes the instant application from both the *Fitzpatrick* and *Industrial-Mine* cases on their facts. The additional material facts alleged in the reconsideration letter and the respondent's submissions on all of the material facts alleged do not persuade the Board to any different view. The other authorities cited by the respondent's solicitors do not deal with construction industry certification applications and are of no assistance to the Board in deciding whether to apply the build-up principle to the instant application.

10. Having regard, therefore, to the material facts alleged in the reply and in the reconsideration letter as well as to the respondent's submissions set out in that letter, the Board remains satisfied for the reasons set out above and in its May 16th decision that this application is not one in which the Board should depart from its consistent practice of determining the number of employees in the bargaining unit for purposes of the count on the basis of the employees actually at work in the unit on the application date, or to depart from its policy and consistent practice of not applying the build-up principle in construction industry certification applications.

11. The Board notes that submission #2 also contains the statement "... no collective agreement has yet been concluded between the parties.". The statement may be correct with respect to the bargaining rights contained in the certificate issued to the applicant for sectors of the construction industry other than the industrial, commercial and institutional sector. It is not accurate with respect to the effect of the certificate issued for the industrial, commercial and institutional sector. By operation of section 145(4) of the Act, the applicant and respondent became bound to the provincial agreement, covering that sector, between the labourers designated employee bargaining agency named in paragraph 3 of the May 16th decision and the designated employer bargaining agency which was in effect when the certificate relating to the industrial, commercial and institutional sector was issued.

12. With respect to the request in submission #3 that the application be put on for hearing "... in order to permit the Respondent company to present evidence in support of its assertions and to make submissions", the Board has accepted the material facts as being true and has weighed and considered the respondent's submissions thereon. Therefore, in the Board's view, no further useful purpose is to be served by holding a hearing.

13. For all of the foregoing reasons, the Board declines to reconsider and vary or revoke its decision which issued May 16th, 1986 in these matters and the Board reaffirms the exercise of its discretion under section 119(2) of the Act to disregard any increase in the number of employees in the bargaining unit after the application date and under section 102(14) of the Act to not hold a hearing into this application.

2992-85-R International Union of Operating Engineers, Local 793, Applicant, v. Consbec Inc., Respondent, v. Labourers' International Union of North America Ontario Provincial District Council and Labourers' International Union of North America, Local 607, Interveners

Membership Evidence - Principal of employer advising employee of forthcoming visit by union rep - Urging employee to sign card - All cards filed not given weight in absence of evidence that incident isolated

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *D. Patterson* and *I. M. Stamp*.

APPEARANCES: *Daniel A. Harris* for the applicant; *Daniel J. Sheilds* for the respondent; *C. M. Mitchell* for the interveners.

DECISION OF THE BOARD; July 15, 1986

1. This is an application for certification filed by the International Union of Operating Engineers, Local 793 (the "Operating Engineers Union") in which it sought to be certified to represent certain employees of the respondent Consbec Inc. Labourers' International Union of North America Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (the "Labourers Union") intervened to oppose the application. The Labourers Union contended that the membership evidence filed in support of the certification application by the Operating Engineers Union was obtained with employer support.

2. The evidence establishes that on February 27, 1986, Mr. Patrick Little, the business manager of Labourers Union Local 607, talked to Mr. Rick Walker, a principal of the respondent, and asserted that the respondent was a related employer with a company for whom the Labourers Union held bargaining rights. Mr. Walker denied that this was the case and indicated that he had been discussing the terms of a possible collective agreement with the Operating Engineers Union, and had signed "a letter" with that union.

3. The Operating Engineers Union filed membership evidence on behalf of five employees. The Labourers Union called one of these employees, Mr. Jean Pelchat, as a witness. Mr. Pelchat testified that early in March 1986, Mr. Walker approached him on the job site, advised him that someone from the Operating Engineers Union would be coming to sign union cards, and that it would be better for both Mr. Pelchat and Mr. Walker if Mr. Pelchat signed a card. Mr. Pelchat further testified that two days later a representative of the Operating Engineers Union appeared on the job site to sign up employees. Mr. Pelchat's evidence went unchallenged and uncontradicted.

4. Given Mr. Walker's role in advising Mr. Pelchat of the forthcoming visit of a representative of the Operating Engineers Union to the job site and in urging him to sign a union card, we are unable to accept the membership evidence filed on behalf of Mr. Pelchat as expressing an independent voluntary decision on his part to join the Operating Engineers Union. Further, given all of the circumstances, including the fact that neither the respondent nor the Operating Engineers Union led evidence to show that Mr. Walker's approach to Mr. Pelchat was an isolated occurrence, we believe it reasonable to conclude that Mr. Walker likely talked to other employees about signing membership cards for the Operating Engineers Union. Accordingly, we are unable to give weight to any of the membership evidence filed by the Operating Engineers Union.

5. At a hearing into the application on June 19, 1986, the Board orally dismissed the application. That oral ruling is hereby affirmed.

1571-83-U; 1658-83-U Rocco Dicognito, Donald Y. Hsu, Louie Savoia, Wolfgang Hauffe, Robert Proulx, Wray Carter, Andy Giamos, and the other persons listed on Schedule "A" to the complaint in File No. 1571-83-U, Complainants, v. Local 414, Retail, Wholesale and Department Store Union, Roy Higson, Dan Garvey, Wayne Barrett, Mike Hunt, John Hudson, and Dominion Stores Limited, Respondents

Duty of Fair Representation - Unfair Labour Practice - Agreement between Dominion Stores and union relating to proposed lay-offs of warehouse employees - Laid-off employees' grievances not taken to arbitration by Union - Union's decision based on refusal to disturb agreement - Whether breach of duty of fair representation - Whether Union's decision not to take a bad faith bargaining complaint against employer amounting to breach of duty - Whether union breached duty by not letting complainant-steward represent group of grievors on his own

BEFORE: *D. E. Franks*, Vice-Chairman.

APPEARANCES: *David C. Moore, Allan Dixon and Rocco Dicognito* for the complainants in File No. 1571-83-U; *Donald Y. Hsu* for the complainants in File No. 1658-83-U; *M. A. Hines and B. Burden* for the respondent company; *Stanley Simpson and Dan Garvey* for the other respondents.

DECISION OF THE BOARD; July 21, 1986

1. By decision dated November 14, 1983 these two proceedings, both of which are complaints under section 68 of the Act, were consolidated. One complaint involves a number of grievors. The second complaint brought by Mr. Donald Hsu in large measure overlaps the other complaint; it does, however, differ from the group complaint in matters specifically relating to Mr. Hsu and I will deal with the matters relating to Mr. Hsu at the end of this decision.

PRELIMINARY REMARKS

2. The two complaints having been consolidated, the complainants were represented by Mr. Moore whereas Mr. Hsu acted on his own behalf. The respondent trade union and the respondent employer were also represented by counsel. Generally, the complaint deals with events that occurred in the initial stages of what was to ultimately become the substantial collapse of the Dominion Stores Limited retail enterprise. The employees affected by these complaints all work in the Dominion Stores warehouse at the West Mall and were all represented by the respondent trade union. These problems arise out of the first, of what became an extensive series of lay-offs, that went on as the proceedings were still in progress. At perhaps the mid-point of the proceedings it became abundantly clear to everyone that the remedy being sought by the grievors, namely, their reinstatement from the lay-off which they had suffered, was something which was completely beyond the reach of this tribunal. There having been numerous subsequent lay-offs by that time, it was clear that the subsequent lay-offs involved far more senior people than the present grievors. It would thus be impossible to order the reinstatement of employment of the present grievors in the

face of the lay-offs of still more senior employees. Notwithstanding this lack of an effective remedy the proceedings continued.

3. This brings me to the first observation which I should like to make about these proceedings. The hearings in this matter went on for almost 40 days, in the course of which some 300 exhibits were entered. As I have noted there were three lawyers and Mr. Hsu participating in the proceedings, and by the termination of the hearings in this matter the case had ceased to resemble a typical hearing of the Ontario Labour Relations Board and had become a proceeding more closely resembling a Commission of Inquiry. It is I think important to take note of this because in many respects the hearing was, in and of itself, a remedy to the concerns underlying the matters before the Board. In the course of the proceedings, both the trade union and the employer made every effort to produce documents requested by counsel for the complainants. These documents were produced and examined and explained in great detail with what can only be described as commendable openness by both the employer and the trade union.

4. The next initial observation which I wish to make also arises from proceedings of such duration, but more specifically, where events are unfolding as the proceedings are running their course. That is the specific problem raised by hindsight. During the year and a half that these proceedings were on-going, there were more and more lay-offs taking place as the Dominion Store enterprise was indeed collapsing. Indeed, other aspects of this collapse were the subject of numerous other proceedings before other panels of this Board. What is important however, for these proceedings, is to note that these other events and other proceedings are irrelevant to the matters at hand. These proceedings focus on a very specific and somewhat narrow range of events and the conduct of the parties must be weighed at the time of those events and not in the light of subsequent events. Whether those subsequent events eventually prove the conduct of the parties to be right or wrong, is neither here nor there for the purposes of these proceedings. This indeed proved to be the most difficult part of examining the evidence and the arguments presented by counsel in the present case. Although I have in these preliminary remarks referred to subsequent and on-going events in evaluating the conduct of the parties at the times in question, I have tried to evaluate that conduct at its specific time and not in the light of subsequent events.

5. There is one further comment of a preliminary nature which I feel compelled to make. In the course of these proceedings it became apparent that at the root of these proceedings was a great deal of personal animosity between certain of the complainants and certain representatives of the respondent trade union. Such animosities are, of course, common in section 68 proceedings. They are however, like hindsight, totally irrelevant to the concerns of this tribunal. Certainly, they can never be a justification for the amount of time and money spent on these proceedings.

THE COMPLAINT

6. The events giving rise to the present complaint occurred in the months of January, February and March of 1983. On January 24th, some 37 employees were laid off from Dominion Stores warehousing operations at 170 the West Mall and at 605 Rogers Road. That had been the first significant lay-off in memory. The major reason for the reduction was the ending of the night-shift at the West Mall warehouse because of a decrease in goods processed by the warehouse. At the time of the lay-off an arrangement was negotiated between the union and the employer concerning recall rights, and it is clear from the statements made by both the union and the company that, at the time, the impact of the lay-off was taken very tentatively. Indeed, there were statements about future efforts to re-employ the laid off people. At the time of the lay-off one of the grievors, Mr. Dixon, who was on the grievance committee, filed a grievance concerning the lay-off.

That grievance, the union subsequently refused to process, and it is that grievance which became, in a sense, the starting point of these section 68 proceedings.

7. It is impossible to emphasize the "newness" of this lay-off. There had not been a significant lay-off in the history of the warehouse and, as was commented in the evidence of some of the grievors in these proceedings, they had thought that they had a future of stable employment since there would always be a "food industry". Thus, it is fair to suggest that the idea of the lay-off itself was greeted by a number of the laid off employees with some very real suspicions.

8. Throughout these long proceedings nobody expressed this better than one of the grievors, Mr. Michael Baldesarra, in the giving of his evidence. Mr. Baldesarra had been employed by Dominion Stores since 1973 and a full-time employee since 1978. Sometime after the lay-off, pursuant to the agreement worked out between the respondent trade union and Dominion Stores, Mr. Baldesarra was called back to work for the occasional day. His evidence is that by mid-March he was working 37 1/2 hours a week at the Rogers Road operation on a regular basis. However, pursuant to the agreement between the company and the trade union, he was receiving the pay of a part-time employee and not getting the benefits of a full-time employee. He also noticed that there appeared to be a number of other laid off employees in roughly the same position as himself. This lead him and others to conclude that the lay-off itself was a sham and that it could only be explained as either a plot by the union and the company to get rid of "some troublemakers" or else it was a scheme by the company to deny some certain full-time employees their benefits as full-time employees. Further, the union was going along with this scheme to deprive the employees of these benefits.

9. It was this suspicion, as voiced by Mr. Baldesarra that something was wrong with the way the lay-off had been handled, which led to the initial filing of the section 68 complaint. Subsequently, as the case progressed and the "lay-off problem" was investigated the complaint broadened to include the previous round of negotiations which had concluded several months prior to the lay-off. This raised the more difficult question as to whether the union had violated section 68 in not proceeding against the respondent employer along the lines set out in the *Consolidated-Bathurst*, [1983] OLRB Rep. Sept. 1411, decision.

10. By the time the final argument was presented in the present case the complaint consisted of three elements. The handling of the lay-off, the matter of whether action should have been taken concerning the employer's conduct in the 1982 set of negotiations, and a more general complaint concerning the allegation by counsel for the complainants that the complainants had been effectively kept in the dark by the trade union. Under section 68 they were entitled to more information than they received at the time in question.

THE COMPLAINT AS IT RELATES TO THE LAY-OFF

11. As noted, this part of the complaint arises out of a number of grievances made by Mr. Dixon concerning the lay-off. Mr. Dixon who was at the time a member of the grievance committee was also being laid off. Clearly, in the matter before this Board he was chief amongst the grievors in the section 68 complaint. In both this complaint and in the grievances, Mr. Dixon represented a group of employees. Mr. Hsu, as a steward, also filed similar grievances. However, we will deal with that matter later on in this decision.

12. On the morning of January 10th, 1983 a meeting was called by the company with the union. There had been an indication on the Friday before that day that the meeting had to do with lay-offs. At the meeting, representatives of the company and the union discussed the intention of the company to give notices on that day, that effective January 24th, 1983, 37 people would be laid

off from the West Mall operation. There was an extensive discussion about how various clauses in the collective agreement would operate. It was clear, however, that the company wanted the union present when the lay-offs were announced to the employees, both for the evening shift and the night shift. The lay-offs did not come as a surprise to Mr. Garvey, the business agent for the union servicing the warehouse operation. He had been aware that business was falling off in the retail stores. Indeed, it appears that a number of the employees in the warehouse were also aware that the tonnage being processed by the warehouse had in fact been decreasing in recent months.

13. The announcement by the company of the lay-offs lead to an extensive series of meetings immediately after the 10th of January. Mr. Dixon was part of these meetings as a member of the grievance committee. It was clear that since there had not been a lay-off of such a magnitude in many years, if at all, that the collective agreement did not specifically address the details of how such a lay-off was to be implemented. Throughout these meetings the union raised a number of concerns and the employer responded. It is a fair characterization of this series of meetings to say that the approach of both the employer and the trade union was that, given this new situation, there was a genuine concern by both parties to resolve the problem as best they could. The employer had to go ahead with the lay-offs, and the union attempted to protect the rights of those laid off as best they could. At the time of course neither party could have foreseen the extent to which subsequent lay-offs were to become a problem. At this point in time, *the approach of both the company and the union to the resolution of the problem of the lay-offs was in the best spirit of a working collective bargaining relationship.*

14. The result of these negotiations was an extensive agreement covering points that were either not in the collective agreement or which might be open to doubt under the collective agreement concerning how the lay-offs would be dealt with. By January 14th the union and the company had arrived at an eight point agreement, the main thrust of which was to give the laid off employees added protection above and beyond what existed in the collective agreement for laid off employees, particularly in the event that the lay-off was not permanent.

15. The union then called a meeting of the employees at the Queensway Lion's Club on January 16th. The intention of the union in calling the meeting was to explain the impact of the agreement of January 14th to the laid off employees and ultimately to have them ratify that agreement. That may have been the union's intention in calling the meeting; it certainly wasn't what happened at the meeting. The evidence as to what happened at the meeting is clear that very quickly the meeting broke down and became quite disorderly. In the course of that meeting, Mr. Dixon who had been party to the negotiations of the agreement under discussion, separated himself from the grievance committee. Then Mr. Hsu, a union steward also affected by the lay-off, addressed the meeting extensively. What is clear, however, is that although the meeting was not an orderly meeting, both Mr. Garvey and Mr. Barrett the secretary of the meeting, recorded in detail the concerns raised by the various employees at the West Mall concerning the lay-offs. These concerns were subsequently raised with the employer. In general the concerns raised by the membership at the meeting of January 16th fall into a couple of distinct categories. On the one hand, there were numerous suggestions made which would involve in effect re-negotiating the collective agreement with Dominion Stores, or would involve changes that Dominion Stores would not likely accede to during the term of a collective agreement. There were matters about specific provisions in the collective agreement which by and large had been addressed by the union in its discussions with the company, and thirdly, it appears there was a substantial element in the meeting that wanted the union to discriminate against the part-time employees which were also represented by the union.

16. Following the meeting of the 16th there was a subsequent meeting with the grievance

committee, the negotiating committee and the union stewards and the company, at which both Mr. Dixon and Mr. Hsu were present, and in which a lot of the detailed considerations concerning the collective agreement were discussed.

17. Subsequent to the lay-off of the 24th of January both Mr. Dixon and Mr. Hsu presented group grievances concerning the conduct of the lay-off. Those grievances were, without exception, considered by the grievance committee and were abandoned in their early stages prior to the grievances being referred to arbitration. The origin of the section 68 complaint lies in the refusal by the union to press those grievances to arbitration. That refusal was made in the context of the agreement of January 14th referred to above, concerning rights for the laid off employees. Thus, although Garvey continued to caution the company there could still be grievances over the lay-off, it is clear that all of the grievances by Dixon and Hsu were considered by the union in light of the arrangement of January 14th. The question in this part then is whether the union in refusing to process those grievances on to arbitration violated section 68 of the Act.

18. In considering the handling of the grievances by the union I will first deal with what I consider to be one of the main undercurrents in these proceedings. It is clear that Dixon's battle over these grievances became a personal battle with the trade union officers. Mr. Dixon's view was and is that the grievances ought to have been pressed on to arbitration regardless of any arrangements between the company and the union. Dixon wanted to protect his job, and the jobs of others and, consequently led a campaign including this complaint to force the matter on to arbitration. I mention this campaign because it is quite incomprehensible to me that this complaint should include amongst the grievors certain part-time employees working at the time of the lay-offs. Clearly, one of Dixon's intentions was to displace those part-time employees in his grievance, and how they could in fact bring the present complaint to urge the union to seek their displacement via an arbitration is completely incomprehensible.

19. It is also necessary to directly raise the issue of this battle between Dixon and the trade union officers because I want to emphasize something that is completely clear on the evidence that was presented before me in these proceedings. Notwithstanding Dixon's campaign against the union officers and his sometimes ill-mannered behaviour in pursuing this campaign, there was not one bit of evidence either direct or indirect before me to conclude that in dealing with Dixon's grievance, this campaign was considered by the trade union officers or that it was a factor in any of their decision-making. There is no evidence before me of a "personal grudge" against Dixon.

20. In fact in assessing the evidence I must go further than that. It is my view of the extensive evidence presented on the consideration of these grievances that, notwithstanding the fact that Dixon tried the patience of the union committees when they came to their decisions with respect to Dixon's grievances, the committee was conscious of Dixon's position and consciously worked at not discriminating against Dixon or otherwise violating section 68 in considering the action to be taken by the trade union. In my view, the grievances were evaluated, considered and rejected giving Dixon every benefit of the doubt.

21. Clearly, the grievances were considered in light of the arrangement that the union and the employer had come to concerning how the laid off employees would be dealt with, and there is no doubt that a refusal to disturb that arrangement (there is some question as to whether there was actually an agreement on the matter) was a consideration by the union in refusing to process Dixon's grievances to arbitration. Consideration of such a matter is clearly not a violation of section 68 of the Act. The duty of fair representation set out in section 68 prohibits conduct by a trade union that is arbitrary, discriminatory or in bad faith. In fact, the origin of the duty of fair representation stems from the notion that the union that obtains bargaining rights for all employees in a bargain-

ing unit is implicitly required not to discriminate against any of those employees in representing the employees in collective bargaining. It is trite to say that in evaluating whether or not a grievance ought to be taken to arbitration, the union is the bargaining agent for all of the employees in the bargaining unit and is therefore entitled to take into consideration this total representation of employees in the overall bargaining unit. (See, the *Municipality of Metropolitan Toronto* [1978] OLRB Rep. Feb. 143 at 147.) Section 68, however, addresses the relationship between the trade union and the individual and prohibits conduct which is arbitrary, discriminatory or in bad faith in relation to the individual complainants under that section. In the present case, there is not one bit of evidence of conduct by the union which can be described as arbitrary, discriminatory or in bad faith with respect to Mr. Dixon himself or his grievances or any of the laid off employees which are the complainants in the present case. With respect to the grievances arising out of the lay-offs, the evidence is clear that the union's grievance committee considered and evaluated every one of the grievances filed by Mr. Dixon and others and, indeed, put its mind quite specifically to the broader problem as to whether grievances could be laid with respect to the lay-off by Dominion Stores. Further, I would add that in my view they correctly rejected as either misinterpretations of the collective agreement or that the promoting of such grievances might lead to less than what they had already obtained from the employer, as a consequence of discussions over the handling of the lay-off.

22. In the present case, I would comment even further that in any grievance that might have been brought concerning the lay-off, there is not any possible view of the facts that would lead one to conclude that this was a case where the company was trying to "put one over" on the trade union. On the evidence before me, I am compelled to comment that the company representatives as well as the union representatives acted fairly and in good faith with respect to what was to them a very nasty job that had to be done. In this regard one could comment that apart from the difficulty of finding a technical violation of the collective agreement upon which to bring a grievance over the lay-off, the case itself does not have a sense of outrage that might even lead an arbitrator (if one was lucky enough to find the right arbitrator) to create a remedy where there might not be one for other arbitrators.

23. There remains one other matter with respect to the lay-offs that must be dealt with. That is the perception referred to earlier that the employees who had been laid off were ultimately recalled and were working full-time with the decreased status of part-time. It should be pointed out that this perception of being treated as part-time is of some consequence to employees in this warehouse since the relationship between part-time employees and full-time employees is such that one does not get to be a full-time employee until one has in effect served a substantial period as a part-time employee. No doubt this history of treating employees in such a manner leads the employees to be very conscious of their status as part-time and full-time employees. Had this been the effect of the lay-offs, that is, had the lay-off merely been a sham, the net effect of which was to lower the status of a group of employees from full-time employees to part-time employees, then clearly the union's refusal to act on behalf of those employees (and thus implicitly engage in such an arrangement) could very well be the foundation of a section 68 complaint. This ground of the complaint does not arise out of any of the grievances filed by Dixon, but really emerges from the present section 68 complaint, although it may not have been adequately pleaded when the complaint originated. However, that is of no consequence since in these proceedings the employment of the laid off employees subsequent to the lay-off was delved into in great detail. Simply put, there is no basis in fact for that perception by the employees concerned. Clearly, they did get some work pursuant to the arrangement that was made on January 14th, but that work was not as much as they might have thought and there is no basis in fact for concluding that lay-off and subsequent employment of the laid off employees was a sham arrangement. In point of fact the company was simply living up to the arrangement it had made with the laid off employees and offering them available employment.

Sometimes of course there was an occasional week of what amounted to full-time employment. That does not indicate an attempt to lower the status of workers, it simply means that determining the number of employees to be laid off is a difficult and not exact problem and is indeed subject to a number of variables outside of the control of the employer.

THE CONSOLIDATED-BATHURST ISSUE

24. In September, 1983, the Board released its decision in *Consolidated-Bathurst*. The effect of that decision is to state that the Board will consider a remedy under section 89 of the Act where it is apparent that in discharging the duty under section 15 of the Act to bargain in good faith, a party to the bargaining misleads another party in order to obtain a collective agreement. The lay-off, as we have noted was announced on January 10, 1982. During the summer and fall of 1981 the union and the employer had engaged in a long and protracted session of collective bargaining for the renewal of a collective agreement. The collective agreement had been ratified on October 3rd and due to a series of technical problems, the actual document was not signed until December 17th. The detail of the late signing of the document is of course of no consequence in these proceedings. The relevant events are those prior to October 3rd.

25. Mr. Garvey had become the business agent representing the warehouse employees in the midst of those negotiations. At the end of September, 1982, Mr. Garvey took over from the on-going business agent, Mr. Hughes, at which time in the negotiations, the wording was substantially settled and the money issues were still outstanding. Mr. Garvey's evidence is that by this time he was already concerned with the decline in the Dominion Stores business activities. Mr. Garvey had come to the job of representing the warehouse employees from the job of representing people in the various retail stores. He was conscious that business was falling off in the stores and was therefore concerned that that would ultimately have an effect on the warehouse operation.

26. The trouble in the stores with the lack of the falling market share had of course been noticed by Dominion Stores. On November 19th, 1982 the president, Mr. Allan Jackson, was replaced by Mr. John Toma. The evidence of Mr. Donald Blair who was at that time Director of Labour Relations for Dominion Stores was that Mr. Jackson was not interested in closing down any of the Dominion Stores that were losing money. Mr. Toma, however, was. In November, 1982, under Mr. Toma's direction, Dominion Stores embarked on a plan to divest itself of certain of its stores by franchising "Mr. Grocer" stores. On November 23rd, 1982 Mr. Blair notified Mr. Don Collins, of the respondent trade union, that Dominion would be closing stores and franchising. Prior to franchising, these stores were supplied by the Toronto warehouse at the West Mall. The Mr. Grocer chain was to be supplied by the Willett warehouse in Kitchener, which was just coming on stream at about that time.

27. Clearly, in the discussions during 1982 to renew the collective agreement, there was no discussion of any impending lay-off or closures. The question is whether Dominion Stores had planned the franchising arrangement prior to the completion of negotiations in 1982. The evidence before this Board is quite clear that the proposed re-structuring of Dominion Stores was not a company policy nor even a contemplated company policy at the time of those negotiations. There had been a feasibility study of franchising, but it is clear that no decision had been taken on the matter and, indeed, prior to the change of president, the policy, if any, was against closing or divesting the various retail stores. The operative date then became November 19th, 1982, a date by which the negotiations for the renewal of the collective agreement had long since been concluded and ratified.

28. The evidence in the present case is, however, that Mr. Garvey at the time of the lay-off

was clearly suspicious that the union had been misled during its recent round of negotiations. Mr. Garvey raised this in the discussions with the employer over the lay-offs. He ultimately referred the matter in extreme detail to his lawyer and the opinion was that there was no case to be made before the Labour Relations Board following the principle in *Consolidated-Bathurst*.

29. The position taken by counsel for the complainants is that in effect the union ought to have brought the section 89 complaint alleging on the basis of *Consolidated-Bathurst* decision in any event. Clearly, that is simply not a correct view of what section 68 requires. Section 68 requires that the union address the problem and fairly consider the problem and act accordingly. In the present case, there is no question that Mr. Garvey and other representatives of the union were concerned about whether a section 89 case ought to be brought against Dominion Stores concerning their bargaining conduct in the 1982 round of negotiations. In so doing they discharged their duty under section 68 of the Act to the affected employees. Indeed, it is of note in the present case, that with regard to the bringing of such a section 89 complaint against the employer there are no extraneous considerations in the decision not to bring the case. That is to say, the decision not to bring such an 89 complaint against Dominion Stores was based solely on the decision that such a complaint would not succeed. Section 68 cannot be stretched to require the bringing of fishing expeditions before the Board under the aegis of section 15 of the Act.

MR. HSU'S COMPLAINT

30. The present case consists of two complaints which were, as we have noted above, consolidated. So far I have been dealing with matters raised primarily in the complaint made by Mr. Dixon. The other complainant is Mr. Don Hsu. In many respects the complaint concerning the refusal of the union to process grievances, the matter is identical to that discussed earlier in this decision in paragraphs 11 to 23 inclusive. The exception is that the difference between Mr. Hsu's complaint and Mr. Dixon's complaint, if any, does not appear to be personal animosity between Mr. Hsu and Mr. Garvey as appears in the other case. Indeed, Mr. Hsu appears to have made the company his target far more than the union.

31. However, Mr. Hsu's section 68 complaint is quite distinct from the other complaint in one very specific area. Mr. Hsu was a steward in the warehouse and his complaint before this Board is that as a steward he ought to have been allowed to pursue the grievance on his own as a representative of a group of employees in the warehouse.

32. The short and simple answer to that question is that such matters are not covered by section 68 of the Act. That is, section 68 deals with the employment relationship and not with the relationship to the trade union generally.

33. However, in the circumstances of this case, I feel compelled to comment in some detail on Mr. Hsu's problem. A trade union sets up its internal structures through its Constitution and By-laws and other such documents. If a trade union denies a steward the right to create factions within a trade union by being a group leader and acting as a group leader independently of the larger body, that conduct of the trade union in prohibiting such group activity is not in and of itself arbitrary or discriminatory or bad faith conduct. This is not to say that the rules can not be applied in a discriminatory manner and thus a violation of section 68 can occur. The point is that the rules, in and of themselves, do not necessarily create a violation of section 68 of the Act. In simpler terms such rules make sense in relation to the broader collective bargaining scheme. As I have noted above earlier, the trade union is required under our collective bargaining laws to bargain on behalf of all employees in a bargaining unit, and the fact that the trade union sets out a structure which

ultimately denies a steward the right to act on behalf of the group stems from the union's obligation to represent all of the employees.

34. For Mr. Hsu the case "fighting the lay-off" was a matter of principle that Mr. Hsu was not prepared to abandon. While that may be quite admirable as an individual characteristic, as a steward in the union, Mr. Hsu was part of a larger organization and when that larger organization refused to allow Mr. Hsu the independence that he sought, the organization did not act towards Mr. Hsu in a way that was either arbitrary, discriminatory or in bad faith.

CONCLUSION

35. There remains to be considered one further matter raised by counsel for the grievors in the present case. That is the matter of keeping the union members in the dark. While it may very well be that keeping the members of a union in the dark may lead to a section 68 complaint, in the present case there is no factual basis for coming to such a conclusion. In the present case the members and laid off members of the union were communicated with by the union's grievance committee and its executive officers. They were not kept in the dark about anything. No doubt the animosity between certain of the grievors and the executive may have lead certain of the grievors to feel that they weren't being kept informed. However, I would point out that being kept informed does not include access to the psychological processes upon which decisions are based. It seems that they concluded they were not informed because they didn't like the answers they got.

36. For the foregoing reasons then, the complaints in all respects are dismissed.

2093-84-U; 2094-84-U Dominion Paving Limited, Complainant, v. Labourers' International Union of North America, Local 183, International Union of Operating Engineers, Local 793, Amalgamated Transit Union, Local 113, Michael Reilly, Frank Spera, John Ricciuto, James Carruthers and Roy Hines, Respondents

Charter - Picketing - Strike - Union members refusing to cross picket line at Toronto Transit Commission job site - Whether Transit Labour Disputes Act violates section 2(d) of Charter - Constitutional challenge not entertained in absence of notice to Attorney General - Whether Board has jurisdiction to entertain section 89 complaint for alleged violation of Transit Labour Disputes Act

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

APPEARANCES: *William S. Challis* for the complainant; *S. B. D. Wahl* for the respondents Labourers' International Union of North America, Local 183, International Union of Operating Engineers, Local 793, Michael Reilly, Frank Spera and John Ricciuto; *H. M. Pollit* for the respondents Amalgamated Transit Union, Local 113, James Carruthers and Roy Hines.

DECISION OF THE BOARD; July 29, 1986

1. These are consolidated applications under sections 92 and 135 of the *Labour Relations Act*, together with a complaint under section 89 of the Act. The facts giving rise to the proceedings

occurred in the course of the respondents Local 183 of the Labourers International Union and Local 793 of the International Union of Operating Engineers seeking to establish, by way of either certification or voluntary recognition, a collective bargaining relationship with Dominion Paving Limited (hereinafter referred to as the applicant). As a result of a ruling by another panel of the Board, a companion file, 1991-84-R, being an application for certification, proceeded separately and concurrently before that other panel ([1986] OLRB Rep. June 705).

2. The cornerstone of the proceedings before the present panel is the passage in August of 1984 of the *Toronto Transit Commission, Gray Coach Lines Limited and GO Transit Labour Disputes Settlement Act*, 1984 (referred to generally as the “*Transit Labour Disputes Act*”). At that point in time the Toronto Transit Commission had reached the end of the normal conciliation procedures with its various unions, including the respondent Local 113 of the Amalgamated Transit Union, and the employees affected were in what is normally termed a “legal strike position”. At the same time, however, concern over the effects of a transit strike was apparently heightened by the imminent arrival in Toronto of both Pope John Paul II and Queen Elizabeth II. The Legislature of the Province in the circumstances saw fit to pass the aforesaid piece of special legislation, rendering it unlawful for economic sanctions to be engaged in with respect to these employees, and substituting instead the resort to compulsory and binding arbitration.

3. As it happens, the applicant Dominion Paving Limited was, in the immediate weeks following passage of the Act, beginning a contract with the City to assist the Toronto Transit Commission (TTC) in the replacement of a stretch of street-car tracks along Queen Street East. As noted, the respondents Local 183 and 793 were, at that time, desirous of establishing a collective bargaining relationship with the applicant. Allegedly to that end, these respondents established a picket-line at the applicant’s Queen Street job site, and the members of the respondent Local 113 (A.T.U.) refused to cross. The applicant’s employees were non-union, and were prepared to continue with their scheduled work, but can only work in tandem with the TTC employees; hence, the net effect of the picket-line was to temporarily bring the reconstruction project in which the applicant was engaged to a halt (regular transit service on such projects is not, and was not, interrupted). The applicant accordingly seeks from the Board a declaration and direction, together with damages it says flowed from the interruption and delay of its contract.

4. With most if not all of the evidence before the Board, the parties agreed to present written argument on a number of preliminary “defences” to the application and complaint, prior to addressing the extensive questions of liability, causation, and damages. In these latter regards, the Board is aware of the fact that the other panel, exploring many of the same factual issues, has, as noted, issued its decision. No submissions of the parties have been made to this panel as to the effect, if any, of this related decision, and we simply note the findings of the other panel in paragraph 10 of its decision as to the non-existence, in light of the response of TTC management itself to the picket-line, of a “strike”.

5. One of the issues which the respondents did raise in their written submissions is the constitutionality of the *Transit Labour Disputes Act* itself. Specifically, the respondents argue that that suspension of normal collective-bargaining rights violates the guarantee of “freedom of association” contained in section 2(d) of the *Charter of Rights and Freedoms*, and that the apprehended visits of the Pope and the Queen are not sufficient considerations to justify such restrictions in a free and democratic society.

6. The Board in the past has acknowledged its willingness to give full consideration to “*Charter*” arguments, particularly where, as here, such argument is central to its own jurisdiction. See, e.g. *Third Dimension Limited*, [1983] OLRB Rep. Feb. 261; and compare *Sault College of*

Applied Arts and Technology, [1985] OLRB Rep. Aug. 1293. This position adopted by the Board appears to be confirmed by the comments of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, (1985) 18 D.L.R. (4th) 321, and continues to be the position of the Board. In order to properly assess a *Charter* argument, however, it is essential that the matter be placed before the Board in an appropriate way. Where such a matter is raised before the Courts, for example, the opportunity for the government to enter an explanation and defence for its legislation is ensured by the provisions of section 122 of the *Courts of Justice Act*, which provides:

(1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

(2) The notice shall be in the form provided for by the Rules of Civil Procedure and, unless the court orders otherwise, shall be served at least ten days before the day on which the question is to be argued.

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question. R.S.O. 1980, c. 223, s. 35.

That procedural section does not apply to the Board itself, but the Board does have the power to control its own procedures, in order to ensure a full and fair hearing. The importance of the government having the kind of opportunity mandated for proceedings in the courts is highlighted by the balancing of interests asked for in the present constitutional challenge, and it is the view of the Board that such challenges ought not to be entertained in the absence of reasonable notice having been given to the appropriate Attorney(s) General.

7. We move on at this stage, therefore, to consider the issue of the "status" of the third-party contractor, Dominion Paving Limited, in these proceedings. Absent passage of the *Transit Labour Disputes Act*, the freedom of employees of the TTC to engage in strike action at the time of the events in question would have been unrestrained. The source of "wrongfulness", if any, therefore, in this case has to be the *Transit Labour Disputes Act*. And flowing from that, it is clear that the status of the applicants to seek a remedy under either of sections 89, 92 or 135 of the *Labour Relations Act* depends upon an analysis of the precise manner in which that special Act intersects with the general provisions of the *Labour Relations Act*. Section 89, in particular, refers only to a contravention of "this Act" (being the *Labour Relations Act*), and clearly, therefore, is only available as a procedure in the present case if it is somehow adopted into or incorporated with the terms of the *Transit Labour Disputes Act*.

8. The applicant, in its comprehensive submissions, cites a number of "canons of interpretation" in support of its positions, but a close reading of the authorities cited by it and the other parties make it clear that in the application of these general rules, as Newcombe, J., put it in *Turgeon v. Dominion Bank*, (1930) S.C.R. 67, at pages 70-71, "Much depends upon the context." Where an allegation is made of the violation of a public statute, there is no reason why a Labour Board, as a matter of policy, would strain to interpret the legislation in a manner which would

deny an allegedly injured party an appropriate remedy. A careful review of the *Transit Labour Disputes Act* as a whole, however, forces us to the conclusion that the respondents are correct in this aspect of their submissions.

9. Section 1(2) of the *Transit Labour Disputes Act* provides:

Unless a contrary intention appears, expressions used in this Part have the same meaning as in the *Labour Relations Act*.

Section 2 provides:

(1) This Part applies to the parties and to the employees of the employer on whose behalf the unions are entitled to bargain with the employer under the *Labour Relations Act*.

(2) Except as modified by this part, the *Labour Relations Act* applies to the parties and to the employees mentioned in subsection (1).

The parties are then defined in section 1 as follows:

1 (1) In this Part,

(d) “parties” means the employer and the unions;

and

(a) “employer” means the Toronto Transit Commission;

and

(e) “unions” means Local 113, Amalgamated Transit Union, Lodge 235, International Association of Machinists and Aerospace Workers, and the Canadian Union of Public Employees, Local No. 2 or any one of them.

Part 1 of the Act (being the relevant part) is by its terms concerned with the collective-bargaining relationship existing between the Toronto Transit Commission and the various unions representing its employees, together with those employees themselves. Thus the conduct sought to be prohibited by the Act is described, in section 8, as follows:

8.- (1) Upon coming into force of this Part,

(a) the unions and the employer shall not call or threaten to call a strike or lock-out;

(b) no employee, member, officer, official or agent of the employer or the unions or of any one of them shall engage in, declare, threaten, authorize or acquiesce in a strike, lock-out or picketing...

The Legislature then went on, in section 8(1)(c), to protect those relationships against interference even by outsiders, in terms which parallel sections 74 and 76 of the *Labour Relations Act*. That is:

(c) no *person* shall counsel, procure, support or encourage a strike, lock-out or picketing contrary to this Part and no person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in a strike or lock-out contrary to this Part.

[emphasis added]

This "offence" section of the special Act, section 8, is then followed by the following section:

9. Sections 92, 93, 94, 95, 97, 98, 99 and 100 of the *Labour Relations Act* apply to the parties and to the employees mentioned in subsection 2(1) with necessary modifications.

Each of these sections in the *Labour Relations Act* deal with *remedies*, being applications for a declaration and direction, for the awarding of damages through arbitration, and for consent to prosecute (section 96 sets out the amount of the fines, and is replaced in the *Transit Labour Disputes Act* by section 10). The critical question is whether section 9 discloses an intent by the Legislature to enumerate an *exhaustive* list of the remedies it considered appropriate, in enforcing this special piece of legislation.

10. The counter-argument is that subsection 2(2) preserves all parts of the *Labour Relations Act* not *explicitly* taken away from the *Transit Labour Dispute Act*, and that there is nothing in that Act which states that sections 89 and 135 do *not* apply. But the problem with that interpretation is that it would render redundant the *express* listing of remedies available from the *Labour Relations Act* in section 9. Section 2(1) states what it is the *whole part* is to apply to, and that is done in terms of the defined parties and the employees in these collective-bargaining relationships. Section 9 then enumerates specifically the procedural sections of the *Labour Relations Act* which are to "apply" to this same relationship. Given the specific focus of the *Transit Act* on the collective-bargaining relationship and threat of a strike existing between the "parties", it does not lack credibility to conclude that the Government carefully considered the remedial avenues available to enforce its apparent intent (being the immediate continuance of transit services) when drafting section 9. The omission of section 135 from that list is simply further evidence that the present set of facts do not fit readily into the scope of this special legislation as the Government envisioned it. We conclude, therefore, that the scope of remedies available under the *Labour Relations Act*, in complaining about a violation of the *Transit Labour Disputes Act*, is in fact intended, in the words of section 2(2), to be "modified by this Part", by the specific enumeration of remedies set out in section 9. That means that neither section 135 nor section 89 are, as a matter of *remedy*, available as a mechanism for the enforcement of rights created by the passage of the *Transit Labour Disputes Act*. Whether an "outsider" to the collective bargaining relationships with which the Act is concerned can claim damages through a section 95 arbitration (pursuant to section 9), or has a civil cause of action, is not before us. What is before us is whether the Board has the jurisdiction to entertain a section 89 complaint for alleged contravention of the *Transit Labour Disputes Act*, and we find that we do not. Both the section 89 complaint and the section 135 application are, in accordance with the foregoing, hereby dismissed.

11. The remaining question is whether the applicant is an "employer" for the purposes of the section 92 application now before us, and therefore able to bring this application for a declaration and direction. We do not, however, decide that question at this stage. In order to receive such relief, the applicant must succeed on the issues of the Board's discretion and whether in fact a "strike" took place (apart from the other issues still to be determined on the merits) and in view of the unavailability of damages in these proceedings, a real question exists in the Board's mind as to the desire of the applicant to continue with the remainder of the application. The Board accordingly directs the applicant to notify it in writing by August 22, 1986, if it intends to continue with the application.

0376-86-R; 0389-86-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant, v. **Elgin Construction Company Limited**, Respondent, v. Group of Employees, Objectors

Adjournment - Certification - Construction Industry - Petition - Practice and Procedure - Statement of desire filed with no return mailing address of representative of employees - Acknowledgement of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *L. A. Richmond*, *D. Randall* and *J. MacKinnon* on behalf of the applicant; *Richard J. Charney* and *Robert Nioli* on behalf of the respondent; *Mike Gregory* on behalf of the group of employees.

DECISION OF THE BOARD: July 11, 1986

1. These are two applications for certification filed under the construction industry provisions of the *Labour Relations Act*. The application in Board File No. 0376-86-R was filed on May 6, 1986 and the application in Board File No. 0389-86-R was filed on May 7, 1986.
2. The Board listed these two applications for hearing in view of the statements of desire that were filed in opposition to the applications. Prior to the scheduled hearing, the Board also authorized a Labour Relations Officer to inquire into and report back to the Board on the list and composition of the bargaining unit in each application.
3. The applicant and the respondent met with a Labour Relations Officer and agreed upon the bargaining unit description in respect of each application. They also reviewed the lists of employees and reached partial agreement on those lists.
4. These applications for certification relate to the industrial, commercial and institutional sector of the construction industry and are made pursuant to section 144 of the Act.
5. The Board finds that Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081, and 1089 of the Labourers' International Union of North America and the Labourers' International Union of North America Ontario Provincial District Council are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that they are constituent trade unions of the applicant.
6. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of the *Labour Relations Act*.
7. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the *Labour Relations Act*.
8. The Board also finds that the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 6, 1978, the designated employee bargaining agency is the Labour-

ers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.

9. At the hearing of this matter, Mike Gregory, a representative of the group of objecting employees agreed to the agreements reached between the applicant and the respondent with respect to the description of the bargaining unit in each application and the lists of employees in the units. Mr. Gregory advised the Board that he was only concerned about the statements he filed in opposition to the application.

10. In Board File No. 0376-86-R, the Board finds, having regard to the agreement of the parties, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and The County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman constitute a unit of employees of the respondent appropriate for collective bargaining. In Board File No. 0389-86-R, the Board finds, having regard to the agreement of the parties, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen and persons above the rank of non-working foreman constitute a unit of employees of the respondent appropriate for collective bargaining.

11. Counsel for the respondent advised the Labour Relations Officer that he wished to argue that six employees who were at work in the bargaining unit in Board File No. 0376-86-R on the day that application was filed ought not to be considered as employees for purposes of determining the level of membership of the applicant among the employees in that bargaining unit. The Officer informed counsel and the Board advised the parties at the hearing that whether or not those six persons were included in the bargaining unit for purposes of the count, the applicant had as members at the relevant time more than fifty-five per cent of the employees in the bargaining unit. The statements of desire, if found to be voluntary, would cause the Board to exercise its discretion under section 7(2) of the Act to order a representation vote because a sufficient number of the applicant's members also signed the statements of desire so that the Board would be uncertain as to whether the requisite number of the respondent's employees continued to support the application for certification at the relevant time.

12. Similarly, in Board File No. 0389-86-R, the Board advised the parties that statements of desire may be relevant to the exercise of the Board's discretion, but that determination can only be made once the challenges to the list are resolved.

13. The Board was about to begin the inquiry into the statements of desire filed in opposition to the application when Mr. Gregory requested an adjournment. The Board received representations from the parties. As counsel for the applicant did not accept the factual assertions made by Mr. Gregory, Mr. Gregory testified. The only evidence adduced before the Board with respect to the request for the adjournment was given by Mr. Gregory. Following the submissions of the parties, the Board recessed and then returned and gave the following oral ruling:

Michael Gregory, a representative of a group of employees opposed to these applications for certification requested an adjournment of this hearing.

These are two applications for certification made under the construction

industry provisions of the *Labour Relations Act*. The notices to employees in Form 78 that were posted state:

“4. Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

(a) contain the *return mailing address* of the employee or representative of a group of employees;

(b) contain the name of the employer concerned;

(c) be signed by the employee or each member of a group of employees.

• • •

7. Should the Board direct that a hearing of the application take place before the Board, any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

• • •

9. If the Board determines that a hearing of this application is to be held, any employee or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 will be served with a notice of hearing in Form 79.”

[emphasis added]

A hearing was scheduled as a result of the statements filed in opposition to the application. The statement that Mr. Gregory filed stated in part:

“The employees of Elgin Construction Company Limited 140 Burwell Road, St. Thomas, hereby show by the following signatures that we do not wish to be represented by the Labourers’ International Union of North America.”

The return mailing address on the envelope used to file the statement was “Elgin Construction 140 Burwell Road, St. Thomas”.

The statement filed is not in the proper form because it does not comply with paragraph 4(a) of Form 78 since it did not contain the return mailing address of Mr. Gregory, the representative of the group of employees.

The Board’s administrative staff acknowledged receipt of the statement in opposition by mailing a letter to the employee whose name and signature appeared first on a statement. That employee’s address was not on the statement and the Board’s staff obtained his address through other means.

That employee received actual notice of the hearing from the Board. He attended at the hearing but did not wish to participate and therefore did not appear on behalf of the group of employees. The respondent also received notice. No notice of hearing was sent to Mr. Gregory because the statement

he filed did not indicate that he was the employees' representative nor did it give his return address.

Mr. Gregory only found out about the hearing yesterday. He called the Board and was told that he did not get notice because there was no indication that he was the employees' representative.

The Board did not issue a notice of hearing in Form 79 to the employees of Elgin Construction. No notice was sent to any employees except for the first employee named on the statement in opposition.

Paragraph 9 of Form 78 states:

"If the Board determines that a hearing of this application is to be held, any employee or group of employees who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5, will be served of the notice of hearing in Form 79."

Had the Board issued a notice of hearing in Form 79 to the employees of Elgin Construction at the address indicated in the statement, Mr. Gregory would have received or been deemed to have received notice of this hearing. However, since no notice to employees of the hearing in Form 79 was posted or mailed to the address provided by Mr. Gregory in the statement, we are satisfied the Mr. Gregory did not have adequate notice of the hearing.

Mr. Gregory requested an adjournment to retain counsel. In our view, it would be unfair to Mr. Gregory to proceed with the hearing since he had less than one day's actual notice of the hearing, and therefore did not have an opportunity to retain or instruct counsel.

This hearing is hereby adjourned.

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[Paragraphs 14-17 omitted: Editor]

1097-85-U Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Complainant, v. Formula Plastics Inc., Respondent

Duty to Bargain in Good Faith - Unfair Labour Practice - Employer insisting on clause allowing employer to discharge with or without cause - "Process" of collective bargaining not showing employer bad faith - Whether content of proposed clause *per se* violation of s. 15

BEFORE: *Robert J. Herman*, Vice-Chairman, and Board Members *W. H. Wightman* and *S. O'Flynn*.

APPEARANCES: *E. G. Posen* and *Paul Magee* for the applicant; *James B. Noonan* and *F. J. Matthews* for the respondent.

DECISION OF ROBERT J. HERMAN, VICE-CHAIRMAN AND BOARD MEMBER W. H. WIGHTMAN; July 4, 1986

1. This is a complaint filed pursuant to section 89 of the *Labour Relations Act* in which it is alleged that the respondent employer has violated section 15 of the Act.

2. Specifically, the union alleges that the respondent has violated section 15 in two respects: First, by its refusal to table a monetary offer during negotiations, and second, by its insistence on clause 8.08 during negotiations, including taking the clause to impasse.

3. Negotiations commenced in December, 1984 and continued through various meetings up until a meeting with a provincial mediator on June 17, 1985. It is common ground that up until this meeting on June 17, 1985, neither party had tabled a monetary offer, nor had either party requested that a monetary offer be tabled, as the parties had agreed to deal initially only with non-monetary matters. The union argues that it did request at that meeting that the employer provide a financial offer, and the respondent denies that any such request was made.

4. The employees went out on legal strike, commencing at midnight at June 20, 1985 and lasting approximately four weeks. At that time the strike was called off, with the majority of employees not returning to the respondent but obtaining jobs elsewhere. Further meetings were held, with the provincial mediator, after the cessation of the strike, and the parties are agreed that at no time during any of these further meetings did the applicant union request the employer to table a monetary package. This complaint was filed on July 30, 1985 and in a letter dated September 5, 1985, the respondent employer provided to the applicant its initial financial package. As of the date of the hearing into this matter, the applicant union had not responded to the employer's financial offer.

5. Based on all the evidence, we conclude that the union never requested of the employer that a monetary package be tabled and the complaint under section 15 with respect to this issue is dismissed. The evidence produced by the applicant suggested that it had requested, at the meeting with the mediator on June 17, 1985, that the respondent table a "comprehensive offer". The applicant did not maintain that it specifically asked for a monetary offer. The witnesses produced by the respondent, including a former member of the union who was present during the meeting in question as part of the union negotiating team, testified that the union at no time during that meeting had requested that a monetary offer be tabled, either through the medium of the mediator or requested directly of the respondent. Parenthetically we note that, notwithstanding that the union never requested of the respondent that it table a monetary offer, the respondent had in any event done so by the time of the hearing into this matter.

6. There remains for consideration the central issue in dispute between the parties, the inclusion of Article 8.08 in the collective agreement. That article purports to give the employer the right to discharge employees, regardless of whether just cause exists, upon payment of specified amounts as severance pay or in lieu of notice. In other words, the respondent employer insists that there be no "just cause for discharge" clause within the collective agreement, and that it retain the discretion to discharge any employee, without cause, provided that severance pay is paid to the discharged employee in accord with the amounts negotiated in the collective agreement.

7. The applicant concedes that the employer is in no way motivated by anti-union animus nor in any way insisting upon such a clause in an effort to avoid entering a collective agreement. The applicant submits that the contents of such a clause *per se* must make it illegal and a violation of section 15, and therefore the employer insisting on such a clause violates section 15. As counsel for the union succinctly put it, "can the company bargain on the principle contained within article 8.08 in this day and age?". In support of its position that the respondent's position was a violation of section 15, the applicant suggested that such a clause was contrary to the spirit and intent of the

Labour Relations Act. The applicant was unable to point to any specific provision of the Act nor to any prior decision of the Board on point.

8. Section 15 of the *Labour Relations Act* reads as follows:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement. R.S.O. 1980, c. 228, s.15.

9. As the Board stated in *Governing Council of the University of Toronto (Royal Conservatory of Music)*, [1985] OLRB Rep. Nov. 1652:

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Scope of the Duty to Bargain

30. The scope of the duty to bargain imposed under section 15 of the Act is squarely raised on the instant facts and has not been dealt with quite so directly by the Board previously. It is useful to refer first to the classic exposition of the duty in *De Vilbiss (Canada) Limited*, *supra*, at paragraph 13:

The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective - that of entering into a collective agreement and [then] section 14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

31. Given that "voluntarism" is the touchstone, it is implicit that the Board's role pursuant to section 15 of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled. This role stands in sharp contrast with the American approach embodied in the "mandatory-directory" classification of proposals and the different consequences for bargaining of classification as a "mandatory" or "directory" item. The mandatory-directory approach has been rejected in this jurisdiction as not consonant with the legislative scheme: see *Consolidated Bathurst*, *supra*; *Pulp and Paper Industries*, *supra*; *Westinghouse Canada Limited*, *supra*.

32. This does not mean that the Board is totally distanced from the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. The Board may have regard to the *content* of items tabled in order to determine whether either party does not intend to enter into a collective agreement (e.g., is engaging in surface bargaining) or whether the employer, for example, is seeking to undermine the union as exclusive bargaining agent by tabling an offer "tailor-made for rejection": see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Ltd.*, *supra*; *Irwin Toy Ltd.* [1983] OLRB Rep. July 1064. Further the Board may review the content of proposals to assess whether any items are "illegal". For example, a strike for recognition or to resolve a jurisdictional dispute is contrary to the legislative scheme:

see *United Brotherhood of Carpenters & Joiners of America*, *supra*; *Toronto Star Newspapers Ltd.*, [1979] OLRB Rep. May 451, [1979] OLRB Rep. Aug. 811. See also: *Croven Limited*, [1977] OLRB Rep. Mar. 162; *A.N. Shaw Restorations Ltd.*, [1976] OLRB Rep. Sept. 504; *T. Barlsen & Sons*, [1960] OLRB Rep. May 80; *Canada Cement LaFarge Ltd.*, [1980] OLRB Rep. Nov. 1583; *Treco Machine Tool Ltd.*, [1982] OLRB Rep. Dec. 1954. The Board notes that, although two examples of demands which have been found to be “illegal” are mentioned and other examples are contained in the cases referred to, the appropriate scope of the concept of “illegality” is not before the Board in this case.

33. However, subject to the comments outlined in paragraph 32 above, the Board will not evaluate or censure the content of proposals tabled by the parties. Again, apart from those comments, if the parties are free to agree that any matter may become part of their collective agreement, it is implicit that each party must be free to table that matter for discussion. While this is perhaps the bluntest enunciation of this principle, the proposition is not novel: see *Westinghouse*, *supra*; *Sunnycrest Nursing Homes*, *supra*; *Consolidated Bathurst*, *supra*; *Canadian Industries Limited*, *supra*....

10. The applicant has conceded that the respondent has not in any way been engaging in surface bargaining, nor has been seeking to undermine the union as exclusive bargaining agent of the employees. Similarly, the applicant concedes that the respondent employer is not in any part motivated by anti-union animus. In effect, the applicant has conceded that insofar as the “process” of collective bargaining is concerned, the respondent employer has not violated section 15. The applicant is really suggesting that the “content” of the proposed clause is *per se* illegal and therefore a violation of section 15.

11. We agree with and adopt the approach taken by the Board in the *Royal Conservatory of Music Case*, as noted above. It is not for this Board, in a complaint alleging bargaining in bad faith, to assess the wisdom or merits of a particular bargaining position or bargaining proposal tabled by either party at the negotiating table. Our concern must be to ensure that the “process” of collective bargaining proceeds properly, and unless it can be said that the contents of a particular proposal impede that process, or violate some other section of the *Labour Relations Act*, it is not for the Board to intrude itself within the collective bargaining process, nor for this Board to redress any economic imbalance between the parties. Although we recognize that a “just cause for discharge” clause is the foundation of most negotiated collective agreements, there is nothing in the statute which requires a particular employer to provide such protection, nor to agree to include it in a collective agreement. It would take clear language in the statute to support the applicant’s contention that the respondent’s insistence on such a clause is *per se* a violation of section 15. The parties must remain free to negotiate and agree to the substantive provisions contained within a collective agreement, and such substantive provisions may very well include the right of an employer to discharge an employee with or without “just cause”.

12. Since in our view the contents of such a clause are not *per se* illegal, it follows in the circumstances that the employer has not violated section 15 by insisting, to impasse, that such a clause be included in the collective agreement. Parties are free to take hard bargaining stances, provided they are not taking to impasse an illegal clause and provided there is no suggestion that the process of collective bargaining is being hampered.

13. For all the above reasons, this complaint is dismissed.

DECISION OF BOARD MEMBER SEAN O’FLYNN;

1. The preamble of the Ontario Labour Relations Act reads:

Whereas it is in the public interest of the Province of Ontario to further harmonious relations

between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees. *Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts, as follows:*

and what follows are the provisions of the Ontario *Labour Relations Act*. So this is the window through which the Ontario Labour Relations Board is directed to interpret the various clauses of the Ontario *Labour Relations Act* and to decide issues that come before this Board. In short, the stated purpose of the Act is to encourage collective bargaining.

2. The Ontario Labour Relations Board has developed over the years into a forum where the lay person needs a lawyer to find a way through the complex legal maze created by precedent setting decisions of the Board. Sometimes both the Board and the lawyers become tangled up in their own legal procedures and precedents so the maze becomes a tangled web and the precedents become signposts to injustice and continued frustration that offer no hope to a person coming to the Board looking for an understandable decision that is fair. That description applies to the majority decision in this case. The decision is unfair and will make no sense to the lay person.

3. The case is simple. The employer insisted that he would not sign a collective agreement that did not give him the right to fire, or get rid of any, or all, of the present, or future, employees as he pleased, whether he had cause to fire them or not. This Board is washing its hands of these workers. It is saying that all the precedents of the Board hold that the Board cannot get involved in the substance of collective bargaining; therefore, when an employer insists that before he signs a collective agreement employees must agree that the employer can fire them without cause, and that the Ontario *Labour Relations Act* allows this to happen. This decision flies in the face of fairness, common sense and the preamble to the Ontario *Labour Relations Act* itself which encourages collective bargaining.

4. Does this decision encourage collective bargaining? No, it clearly discourages it. On the one hand, it says to workers, "Don't waste your time or your money joining a union because the Ontario Labour Relations Board has ruled that an employer can insist that the collective agreement contain a clause which gives him the right to fire you for no reason." On the other hand, this decision tells employers "You can refuse to enter into a collective agreement with your employees unless they agree to a clause in the agreement which allows you to fire them at your whim or as you please."

5. The idea that employees have a right to work in dignity and without fear that they will be dismissed for looking sideways at the employer is generally accepted in society. Section 44 of the Ontario *Labour Relations Act* insists that there will be a grievance procedure in every collective agreement with an independent arbitration ruling on disputes that arise. The most fundamental dispute that arises is whether or not an employer had enough cause to fire an employee. How can this Board allow an employer to get around section 44 by insisting as a condition of signing a collective agreement that the employees agree that they can be fired at whim.

6. Section 61 of the Federal Canada Labour Code provides for an independent arbitrator to decide whether or not an employer was right or wrong in firing an employee who is not covered by a collective agreement. In addition, the provincial government of Ontario has indicated that it intends to introduce similar legislation. In the face of such broad acceptance of the concept that an employer cannot fire employees at whim, how can this Board say that it is a legal proposition for the employer to insist as a condition of having a collective agreement that the employees give the employer more power than he would have had if the employees did not join a union.

7. For the Board to insist that it must wash its hands of the content of a collective agreement to the extent that it hands down a decision that is:

- (1) out of tune with society's standards;
- (2) clearly unfair;
- (3) silly,

is absurd and shows that the Board is a prisoner of its own precedents.

8. The Board should rule and I would have ruled that the employer was bargaining in bad faith by insisting that the employees freely give up all job security in order to get a collective agreement. If the employees agreed to cut their own throats by accepting this condition, then, having a collective agreement and indeed a union, would be a waste of time and money. It also would be an absurdity and so is the majority decision.

2962-85-R International Brotherhood of Electrical Workers, Local 353, Applicant, v. Galil Electric Company Limited, Respondent

Certification - Construction Industry - Employee - Grievors laid-off before reporting to work on morning of the date of the application - Whether grievors should be included in count - Whether construction industry test of "actually at work on date of application" satisfied

BEFORE: *R. A. Furness*, Vice-Chairman, and Board Members *H. Kobryn* and *I. M. Stamp*.

APPEARANCES: *Bernard Fishbein* and *Michael Lloyd* for the applicant; *Anne E. Burke* and *H. Heskin* for the respondent.

DECISION OF THE BOARD; July 8, 1986

1. The applicant has applied for certification with respect to a bargaining unit of electricians and electricians' apprentices. The applicant has also filed a complaint under section 89 of the *Labour Relations Act* with respect to the respondent (see Board File No. 3002-85-U). In that complaint the applicant has alleged that certain employees have been dealt with by the respondent contrary to the Act.

2. In the instant application, the applicant challenged the list of employees filed by the respondent. The respondent filed lists of employees which contained five names on Schedule "A" and four names on Schedule "C". The four persons whose names appear on Schedule "C" are also named as grievors in the complaint under section 89 (see Board File No. 3002-85-U). It was the position of the applicant that if the employees on Schedule "C" were properly on Schedule "A" then it might well place the applicant in a certifiable position and so render academic the issues under section 8 of the Act and the managerial challenges.

3. The applicant stated that it had a two-level argument. Firstly, the four employees on Schedule "C" were laid off for union activity and should therefore be listed on Schedule "A". The applicant agreed that this could only be determined after hearing evidence on the dispute over the reason for their alleged layoff. Secondly, independent of any anti-union motive and assuming the

employees were laid off for *bona fide* reasons, how ought the Board deal with employees laid off in the morning as they were about to proceed and leave their homes to work at the construction site?

4. The applicant and the respondent stipulated the following facts:
 1. This is an application for certification in the construction industry.
 2. The respondent was engaged on a multiplicity of job sites.
 3. All of the four persons listed on Schedule "C" were working on various sites among these sites on March 3, 1986 (all within the Board's geographic area #8).
 4. The practice of the respondent is for employees to report to the job site and to report to the same job site as they were working the day prior unless notified by the respondent.
 5. March 4, 1986, is the date of the application for certification.
 6. On March 4, 1986, between 6:30 and 7:30 a.m., just prior to leaving for work, the four employees on Schedule "C" were called by Mr. Heskin and told they were laid off.
 7. All of these employees received letters dated March 4, 1986, advising that they were laid off. There had been typed in at the bottom of these letters that the effective date of layoff was March 3, 1986. Each letter was sent by registered mail and each bears the date of registration of March 5, 1986.
 8. None of these employees actually did any work on March 4, 1986.
 9. None were actually paid on March 4, 1986.

The applicant and the respondent agreed that for the purposes of this argument the issue of Oreste Carere reporting for work need not be dealt with.

5. The applicant is seeking to have the Board include for the purpose of the count the persons whose names appear on Schedule "A" as well as the persons whose names appear on Schedule "C". There is no dispute that the names which appear on Schedule "A" are to be included for the purpose of the count. The dispute occurs with respect to the inclusion of the persons whose names appear on Schedule "C". It is the position of the respondent that the persons whose names appear on Schedule "C" ought not to be included for the purpose of the count. The Board will consider the arguments of the applicant and the respondent at the second level argument (that is to say, assuming for the purpose of argument, without so finding, that the respondent has not acted out of any anti-union animus in its treatment of the grievors in Board File No. 3002-85-U) based upon stipulations referred to in paragraph 4.

6. When an application for certification is filed, the Board is required under section 7(1) of the Act to ascertain the number of employees in the bargaining unit at the time the application was made. To this end, the Board requires the respondent to file schedules of employees. The names of employees who actually worked on the date that an application is made, ought to appear on Schedule "A" or Schedule "B" ("A" for full-time employees and "B" for part-time employees). These employees are included for the purposes of the count because they were actually employed

on that date. Employees who are not actually at work on that date are listed on Schedule "C" or Schedule "D" ("C" for employees who are absent on layoff and "D" for employees who are absent for other reasons). Whether or not employees whose names appear on Schedule "C" or Schedule "D" are to be included for the purpose of the count is normally determined by the application of the rule known as the 30/30 day rule. Under this rule an employee who works within the 30-day period immediately preceding the date of application *and* is expected to return or has returned to work within the 30-day period immediately following that date is included as an employee for the purpose of the count. An employee whose most recent or anticipated next appearance at work does not fall within the 30/30-day rule is not sufficiently linked by the active performance of work with the date of application to be included for the purpose of the count.

7. The matter of arriving at the list of employees for the purpose of the count referred to in paragraph 6 has been generally applied, apart from applications for certification filed under the construction industry provisions of the Act, and the Board was referred to decisions which were regarded by the applicant as supporting its argument. In *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840, the Board stated at page 844:

20. It is our opinion that the persons who, not having been forewarned by the respondent, presented themselves at their place of work in the reasonable expectation of carrying on their normal employment must be found to be employees in the bargaining unit on the date they so reported and should have been shown on schedule "A" and not on schedule "C", notwithstanding the fact that they were laid off indefinitely without performing any work on that same date.

In *Holiday Juice Ltd.*, [1984] OLRB Rep. Feb. 277, and in *Lajambe Forest Products Limited*, [1985] OLRB Rep. July 1088, the Board followed the decision in *Amplifone Canada Ltd.*

8. The stipulated facts in the instant application are quite different from the facts in the decisions referred to in paragraph 7. The applicant and the respondent were unable to refer the Board to any decisions which were on point with the issues in the instant application.

9. In the instant application the employees were laid off before they actually reported to work at a job site and none of them actually performed work on March 4, 1986. On these facts alone, the cases which are referred to in paragraph 7 are distinguishable. However, the essential difference between the instant application and the cases referred to in paragraph 7 is the fact that the instant application is an application which has been properly filed under the construction industry provisions of the Act. In such applications, the Board determines that the number of employees in the bargaining unit at the time the application was made under section 7(1) of the Act is the number of employees who were actually at work on the date of the application. This method of determination recognizes that employment in the construction industry is usually of limited duration and that the number of persons in a particular trade who are required at any point in time may vary substantially for sound reasons in the scheduling of work. This method also permits the determination to be made based upon the objective consideration of the number of employees actually at work on the date of the application rather than the more difficult assessment of the subjective factors which are based upon intention of layoff situations. This method of determination is easily ascertained and is understood in the construction industry as being of wide application. Thus in *Keystone Contractors Limited*, [1966] OLRB Rep. Feb. 821, the Board dismissed an application for certification where there were no employees at work on the date of application due to a heavy snowstorm even though there were employees at work the day before and the day after the date of application. The method of determining the number of employees in the bargaining unit at the time the application was made under section 7(1) of the Act recognizes the short-term and often indeterminate length of the employment relationship in the construction industry.

10. For the foregoing reasons, the Board is not prepared to find, on the stipulated facts, that the employees on Schedule "C" are to be included for the purpose of the count.
11. The Registrar has listed this matter for continuation of hearing.

0599-86-R Ontario Catholic Occasional Teachers' Association, Applicant, v. The Halton Roman Catholic Separate School Board, Respondent

Certification - Practice and Procedure - Representation Vote - Board requiring filing of fresh Form 9 Declaration when membership evidence transferred from one certification application to another - Failure to file Form 9 does not prevent Board acting on "appearance" created by applications for membership cards and receipts - Failure only fatal when application comes on for hearing - Appropriateness of conducting mail ballot in occasional teachers' constituency

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

DECISION OF THE BOARD; July 25, 1986

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken. By order dated June 6, 1986, the Board authorized a Labour Relations Officer to confer with the parties as to their positions on the description and composition of an appropriate bargaining unit and a voting constituency for the purposes of this application, to examine the records of the applicant and of the respondent for the purpose of obtaining the information required the Board under subsection 9(2) of the *Labour Relations Act* ("the Act"), to confer with the parties with respect to a voters' list and vote arrangements for the purpose of any vote that might be directed by the Board and to report to the Board thereon. The Officer so authorized met with the parties on June 18, 1986. In her report on that meeting, she noted that a Form 9 Declaration has not been filed by the applicant, and that counsel for the applicant had indicated that a Form 9 Declaration filed in a previous application "was to have been transferred to this file." The Officer also noted that counsel for the applicant had requested, and counsel for the respondent had agreed, that any pre-hearing representation vote be conducted by mail.

2. The Registrar was then directed to, and did, write to the solicitors for the applicant and the solicitors for the respondent inviting their further written submissions on certain questions, the first of which was this:

In considering whether there is an appearance of membership in the required percentage under subsection 9(2) of the Act, can the Board give any weight to membership documents which are not the subject of a Form 9 Declaration filed in and made with specific reference to the instant application?

In this respect, the attention of counsel was directed to the Registrar's letter to counsel for the applicant of June 6, 1986, the different application date in the Board file from which membership evidence had been transferred and the Board's decisions in *A. P. Woodworking Shop*, [1967] OLRB Rep. May 153, *Precision Automotive Co. Limited*, [1967] OLRB Rep. Nov. 740; *Joffre Lapointe & Sons Limited*, [1971] OLRB Rep. Sept. 621 and October 629; *Wiltshire Catering*, [1975] OLRB Rep. Dec. 916 and *Westgate Nursing Home Inc.*, [1981] OLRB Rep. Apr. 503.

3. In his written submissions on this issue, counsel for the applicant quotes from the Board's decision in *Canadian General - Tower Limited*, [1968] OLRB Rep. Oct. 712 at 715. The quoted passage begins with these words:

... [Form 9] Declaration concerning membership documents is not, of itself, membership evidence ...

Counsel then makes this submission:

In the instant application, the Board was requested to transfer all the membership evidence to the new file, which includes in our submission, Form 9 evidence substantiating the evidence of the cards. If the Board had intended to require a new Form 9 relating to the membership cards transferred, it should have said so explicitly. To do anything else would be a gross abuse of administrative discretion.

4. The Board's requirement of a fresh Form 9 Declaration when membership evidence is transferred from one file to another is well settled. As the Board stated in *Westgate Nursing Home Inc.*, [1981] OLRB Rep. Apr. 503:

12. An applicant who requests the Board to transfer membership evidence from one certification application to another must file with the Board in the latter application a Form 8 [now 9] Declaration concerning the transferred membership evidence (see, *Joffre Lapointe & Sons Limited*, *supra*, and *A. P. Woodworking Shop*, *supra*).

Rule 6 of the Board's Rules of Procedure provides:

6. The applicant shall, not later than the second day after the terminal date for the application, file a declaration concerning membership documents in Form 9.

Having regard to the language of paragraph 2 of Form 9, a declaration prepared for the purposes of a previously filed application could not comply with the requirements of the rule: *A. P. Woodworking Shop*, *supra*. The Board's requirement of a fresh Form 9 Declaration was made clear in *this* case in the Registrar's letter of June 6, 1986 to the applicant. That letter noted that:

As requested, 51 combination applications for membership receipts previously filed with the Board (our File No. 0414-86-R) have now been transferred to this application.

The letter then went on to note that a blank Form 9 Declaration was enclosed and that

Form 9 must be received by the Board or mailed Registered Mail to the Board on or before June 18, 1986.

We reject the suggestion that by acting in the expectation that applicants for certification will read its rules and its Registrar's letters and act accordingly, the Board commits a "gross abuse of administrative discretion."

5. In *Northridge Plastics Limited*, [1986] OLRB Rep. July 1011, the Board had to decide whether it could order a pre-hearing representation vote when the Form 9 Declaration filed by the applicant was defective because it had not been signed by the declarant and did not, therefore, satisfy the requirement of Rule 6. In that case, the Board made these observations at p. 1012:

Rule 82(2) empowers the Board to enlarge the time prescribed for filing a Form 9 declaration. In applications other than those in which a pre-hearing vote has been requested, the Board has generally permitted filing of the Form 9 declaration at any time up to and including the hearing of the application: *The Intelligencer*, [1976] OLRB Rep. Mar. 120; *Wiltshire Catering Division of J. V. Wiltshire Ltd.*, [1975] OLRB Rep. Dec. 916; *Westgate Nursing Home Inc.*, [1981] OLRB Rep. Apr. 503. When the application reaches the point at which the Board must determine

whether it is "satisfied" that a particular percentage of employees in the appropriate bargaining unit were members of the applicant trade union at a particular time, the Board will not act on membership evidence which is unsupported by a properly completed Form 9 declaration. In an application of this sort, that question arises *after* a pre-hearing representation vote is conducted, as appears from subsection 9(4) of the Act:

- 9(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

4. The question we must address at this stage is not whether we are "satisfied" that the applicant enjoys a particular level of membership support, but only whether it "appears" to us that there is membership support for purposes of subsection 9(2) of the Act sufficient to permit taking the administrative step of conducting a pre-hearing representation vote. The test in subsection 9(2) is whether the requisite appearance emerges from "an examination of the records of the trade union and the records of the employer ..." Combination application for membership and receipt cards are "records of the trade union." Neither the absence of a Form 9 declaration nor the presence of a defective one can diminish either the character of cards as records or the appearance of membership they create. Accordingly, subsection 9(2) does not appear to require that the Board examine or even have before it a Form 9 declaration at the time it determines whether to direct a pre-hearing representation vote. Of course, if no Form 9 declaration is filed or accepted for filing before the Board makes its determination under subsection 9(4), or if the Board then finds that the Form 9 declaration filed by the applicant is unreliable, the application will be dismissed at that point, and that is so even if a majority of votes were cast in favour of the applicant in the pre-hearing representation vote: *W & H Voortman Limited*, [1975] OLRB Rep. Aug. 605. Thus, while the Board can and should direct a pre-hearing representation vote in an otherwise appropriate case when a Form 9 declaration has not yet been filed or, if filed, is obviously defective, it would be prudent in such circumstances for the Board to direct that the ballot box be sealed unless and until an apparently proper Form 9 declaration is filed on consent of the parties or with leave of the Board.

We adopt the Board's analysis in *Northridge Plastics Limited*, *supra*. The failure to file a Form 9 declaration made with specific reference to the instant application does not prevent our acting on appearance created by the application for membership and receipt cards transferred to this application, however fatal that omission may be if it remains unremedied when this application comes on for hearing.

6. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

7. The Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All occasional teachers employed by the respondent in its schools in the Regional Municipality of Halton, save and except employees in bargaining units for which any trade unions held bargaining rights as of May 30, 1986.

For the purpose of clarity, we should note that in this description, the term "occasional teacher" has the meaning assigned to it by clause 1(1) 31 of the *Education Act*, R.S.O. 1980, c.129, as amended. This voting constituency represents the unit of employees of the respondent which the applicant and respondent agree is appropriate for collective bargaining. The question whether the appropriate bargaining unit is to be described in that way is, of course, one which is dealt with only

after the vote is conducted, when all interested persons, including employees, are given the opportunity of a hearing to deal with the matters described in subsection 9(4) of the Act. The parties and the Board may wish to consider whether the phrase “in its schools” is surplusage which might attract avoidable arguments about what a “school” is.

8. All employees of the respondent in the voting constituency on June 16, 1986, who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote.

9. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

10. Having regard to the Board’s observations in *Northridge Plastics Limited*, we direct that the ballot box be sealed and the ballots cast not counted unless and until an apparently proper Form 9 declaration is filed by the applicant with leave of the Board. In his written representations on the question of the Form 9 declaration, counsel for the applicant notes that the Board could exercise its discretion to allow late filing of a proper declaration. Counsel for the respondent has not opposed the request for leave implicit in this submission; indeed, counsel for the respondent filed no submissions in response to the Registrar’s request. In these circumstances, we hereby grant leave and extend the time for filing by the applicant of a Form 9 declaration in this application to two weeks from the date of release of this decision.

11. The second matter the Registrar raised with counsel by direction of the Board concerned the applicant’s request that the requested pre-hearing representation vote be conducted by mail. Counsel were invited to address the following questions:

1. What concerns in this case favour conducting a vote by mailed ballot?
2. Why should any pre-hearing representation vote in this case not be conducted in the ordinary manner, with polls held at one or more of the respondent’s locations at reasonable times, on notice given both in the ordinary manner and by mail?
3. Whatever method of balloting may be selected, is it appropriate to conduct a vote of occasional teachers during the months of July and August?

With respect to the third question, counsel for the applicant submits that it would not be appropriate for a vote of occasional teachers to be taken in July or August, and suggests that the vote be held during the first week of September. Counsel’s submissions with respect to the other two questions are as follows:

The nature of the work of the employees in question is temporary and the place and hours of work can and usually do vary from day to day. Occasional teachers have no regular place of work to which they normally report, and when working could be at any of the Board’s thirty schools. The Board’s regular method of holding the vote at the employees’ place of work, could in this case require as many as thirty different polling places, and then would reach only those occasional teachers at work on that day at those schools. Teachers who were not working in the Board’s schools or were working in schools where there were no polling stations, or were for other reasons unable to attend, would be deprived of their vote in this matter.

Conducting a vote by mailed ballot eliminates the problems of multiple polling places and the requisite staffing of them, and ensures that the ballot reaches the teacher or his or her home address, thus enabling his or her participation in the process.

...

With regard to all of the submissions made to Issue #2 it is important to recall that the *York* decision mentioned above [*The Board of Education for the City of York*, [1985] OLRB Rep. May 767] has already decided the issue of a mailed ballot. Mail-in ballots then should not be refused through administrative decisions, but through a decision of the Board.

12. With respect to the first paragraph of counsel's submissions, we acknowledge that there will be some difficulty in adapting the Board's ordinary approach to certification applications to matters involving occasional teachers. There is, for example, a major difficulty in determining which persons will be considered to be occasional teachers "employed" by a respondent school board on the application date or at any other relevant time. The Board struggled with that problem in *The Board of Education for the City of York*, [1985] OLRB Rep. May 767. The eligibility test it devised - all those on the school board's list of individuals actively interested in employment who have worked at least one day in the preceding twelve month period - was a response to the need for a "bright line" test to determine which occasional teachers' employment attachment to the school board is sufficient to warrant taking their views into account, when the Board's usual tests would ordinarily enfranchise only a fraction of the identifiable individuals whose employment might be affected by a certification decision. As a result of adopting that test, one would expect that a majority of eligible voters will not be at work for the school board on any day on which a vote by poll might be conducted. Does this compel the use of the postal system as a substitute for polling booths?

13. It is seldom, if ever, the case that all employees eligible to vote are at work when a representation vote is conducted by poll at their place of work. Even in a unit of full-time employees, on any given day there are often eligible voters who are not at work because they are not scheduled to work. They may be on vacation. They may be on a short or long term leave for any number of reasons, including sickness or pregnancy. They may be on temporary (as opposed to indefinite) layoff. Obviously, the number of eligible voters who may be absent from work when a poll is conducted will increase when a unit of part-time workers is involved. In these cases, voters who are not scheduled to work on the day of the vote are not disenfranchised - they are merely expected to attend at their place of work if they wish to exercise their franchise. In the ordinary course, therefore, an otherwise unnecessary trip to their work place is not thought to be too much effort to expect from employees who wish to have their wishes taken into account in representation matters.

14. As counsel notes, occasional teachers ordinarily have several potential work places. Presumably, a central location (or locations) can be identified such that the effort required to travel to it (or one of them) is not substantially different from the effort which might be involved in travelling to work on a teaching assignment. Apart from the fact that there are more of them as a percentage of the total, those occasional teachers not actually at work at such a central location are in no different position from that of employees in other contexts who are not at work on the day of a vote, with this exception: some of them may have occasional teaching assignments at locations other than the central location which might prevent them from attending a poll conducted during their working hours. This problem, too, occurs in other contexts - with truck drivers, for example, and other employees whose work duties take them away from the otherwise logical polling place during working hours. The answer in those circumstances has been to ensure that the polls are open at times outside those work hours, so that employees in that position may also attend and cast their ballots.

15. It seems to us that resort to something resembling the Board's ordinary vote procedure need not require that polls be conducted in every school, nor would that disenfranchise individuals who could be described as actively interested in employment as an occasional teacher, if polls are

open both during and outside the ordinary hours of work of occasional teachers. It would, however, require of nearly all eligible voters that they make an effort roughly equivalent to the effort involved in attending at work, in order to cast a ballot.

16. The second paragraph of counsel's submissions addresses the problems of administering the vote. It presumes that a mailed ballot vote is administratively simpler than a vote by poll. In fact, the Board's experience with mailed ballot votes during the last year is that such votes seem to consume considerably more of the Board's limited administrative resources than would a vote in which notice is given to eligible voters by mail and the actual vote is conducted in the ordinary manner by means of polls at one or a small number of central locations. The difference in required time and effort results from the vastly increased paperwork necessitated by the inability of the Board (and the parties' scrutineers) to make a visual identification of each person to whom a ballot is given. Among other things, this requires coding each of the preaddressed, postage paid return envelopes in which voters are instructed to return ballots. Records of the address to which each envelope is sent must be maintained. Coding on envelopes received must be noted and cross-checked to prevent duplication. Interestingly, in the 7 such votes for which data were available at the time of this decision, this coding was deliberately obliterated or cut off by over one per cent of those who mailed ballots to the Board, thus effectively spoiling the ballots they returned. The mailed ballot is by no means administratively simpler than a poll vote.

17. Apart from the administrative cost, mailed ballot votes suffer from a number of obvious frailties. If the parties' record of a voter's address is inaccurate, that voter will be disenfranchised. If, as has regularly happened, the parties disagree on the correct address of an employee, there is no easy way to resolve the problem, since only one ballot can be allocated to that voter. By contrast, if the mails are used only to give notice of the vote, that sort of dispute is easily dealt with by sending notice to every address supplied by either party. A voter who has moved and learns of the vote "by the grapevine" can simply go to the poll, if there is one. If the vote is conducted by mail, however, it may be more difficult for that voter to vote. How does she retrieve the ballot sent to her old address? Should the Board give her another ballot? What if the ballot sent to her old address is marked and returned? Neither the Board nor the parties can be certain that ballots returned to the Board were cast by eligible voters, nor can eligible voters be certain that the ballots they cast will be received by the Board by the specified deadline (or at all.) Finally, the mailed ballot vote may well be perceived by voters as less secret than the poll type. This may explain the cases in which ballots were spoiled as a result of the obliteration or removal of coding on return envelopes.

18. In the third paragraph of his submissions counsel submits that the decision in *The Board of Education for the City of York, supra*, "has already decided the issue of a mailed ballot." In that case, the Board reviewed the need to give applicant trade unions the names and addresses of eligible voters so that each of the parties will have an equal opportunity to inform voters and all voters, in turn, can be involved in the campaign leading to the vote. After a careful analysis of the reasons for so doing, the Board in the *York* case decided that:

74. For these reasons then, when a application for certification in respect of occasional teachers is made under section 9 of the Act (the pre-hearing vote section), or a vote of occasional teachers is directed under section 7, the respondent employer will be required to file with the Board a list of the names and addresses of all employees known to it to be in the voting constituency. Such list will be available to any person or party with a direct interest in the campaign.

Then, without having addressed the matter earlier in its decision, the Board added:

... Further, since most of the occasional teachers will be geographically dispersed, and have no need to visit a particular school, the representation vote should ordinarily be conducted by

means of a mailed ballot. While this may build in a little delay, it will enhance the voters' opportunity to conveniently indicate their choice for or against trade union representation.

At the time that was written, no votes of occasional teachers had ever been conducted by mail, and the number of occasions on which the Board had previously conducted a vote by mail could have been counted on the fingers of one hand. The mailed ballot vote had been used when the job duties of eligible voters had taken them outside the country and when the number of voters was small and they were located in very remote areas of the province. It had never been used in cases involving a large number of voters to spare them the trouble of an otherwise unnecessary trip to work. The panel in the *York* case did not address the potential frailties of a mailed ballot vote. The Board's experience in the period of roughly one year since the Board began conducting occasional teacher votes by mail was not then available to it, so the panel in the *York* case could not and did not address the problem of administrative costs which such votes have created, nor could it then assess whether the imagined benefits of this method of voting could actually be attained.

19. If convenience were the only barrier to a high participation rate in occasional teacher votes, one would expect a very high participation rate in mailed ballot votes. In the seven cases mentioned earlier, however, only about 59 per cent of ballots mailed out were returned to the Board, and nearly two per cent of those were spoiled by the senders' failure to follow accompanying instructions. In no case did the participation rate reach or exceed 70 per cent; in one case only 25 per cent of ballots mailed were returned to the Board. Although the participation rate in all but one of those seven votes was higher than was experienced in the poll vote conducted in the *York* case, it is not clear whether the improvement results from the subsequent practice of mailing the ballots or from the subsequent practice of giving the applicant trade union the mailing list.

20. In the *York* case, the Board refused to follow an earlier decision on the eligibility issue, saying:

... as Professor Laskin (as he then was) observed in *Re C.G.E.* (1959), 9 L.A.C. 342, the first look at a problem is not necessarily the correct look ...

In retrospect, it seems to us that the Board's broad pronouncement on the superiority of mailed ballots in certification applications affecting occasional teachers may have been premature. While we do not suggest abandoning the mailed ballot for all but the most extreme cases, it seems to us that the use of mailed notice and central polls should be seriously considered in each case. Without some experience of this method of voting in cases where the union has been given voters' names and addresses in advance in accordance with the *York* decision, there will be no way of assessing whether the more complex mailed ballot vote procedure is so clearly superior as to warrant continuing to incur its higher costs. Unless specifically addressed in the decision directing the vote, the method of voting in cases involving occasional teachers should be a matter for the Registrar. The Board's policy that notice of the vote be given by mail to eligible voters and that the names and addresses of those voters be given to the applicant are unaffected by this decision.

21. In this case, we see no reason to direct that the pre-hearing representation vote herein be conducted by mail.

22. The matter is referred to the Registrar.

0689-81-M United Brotherhood of Carpenters and Joiners of America, Local 18, Applicant, v. **General Contractors Association of Hamilton**, Labour Relations Bureau of the Ontario General Contractors Association, Acoustical Association of Ontario, Resilient Flooring Contractors Association of Ontario, Caulking Association of Ontario, Industrial Contractors Association of Canada and Interior Systems Contractors of Ontario, Respondents, v. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, Intervener

Arbitration - Construction Industry Grievance - Whether established local practice of carpenters performing "cutting and placing of lagging" work

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *M. A. Ross*.

APPEARANCES: *Stanley Simpson*, *Douglas Wray* and *J. Tarbutt* for the applicant; *B. W. Binning*, *Jim Thomson* and *Fred Reaume* for the respondents; *Douglas Wray* for the intervener.

DECISION OF THE BOARD; July 11, 1986

1. The matters herein arise from the referral of a grievance in the construction industry under section 124 of the *Labour Relations Act*. An interim decision of the Board notes the agreement of the parties that the Board should determine the grievance pursuant to the provisions of the first provincial agreement between the parties, even though it had been filed under a successor provincial agreement. This is because the applicant ("Local 18") had invoked certain provisions of the first provincial agreement. More specifically, Local 18 had sought to have a committee, provided for under clause 19.03 of the provincial agreement which was in effect from September 6, 1978 to April 30, 1980 ("the Agreement"), determine whether there was an established local area work practice of the contractors bound to the Agreement assigning certain work covered by it to members of Local 18, within the local's geographic jurisdiction. The grievance as originally referred to the Board included a variety of work listed in Schedule "A" - Work Covered By This Collective Agreement of the Agreement. By the end of the proceedings, the parties had resolved their dispute respecting all of the work originally at issue except work described as "... the cutting and placing of lagging.". It is with respect to that work which the Board is to determine whether there is an established local area work practice.

2. It is useful here to set out the full text of Article 19 - Work Jurisdiction of the Agreement:

ARTICLE 19 - WORK JURISDICTION

19.01 The assignment of all work claimed in Schedule "A" and which is in accordance with established local area work practice shall be to members of the United Brotherhood of Carpenters and shall take precedence over any assignment awarded by any method of jurisdictional disputes settlement. Where it can be established, local area work practice shall be as under the Collective Agreements which were in force immediately prior to the effective date and application of this Agreement. For the purpose of this Article "local area" shall mean the geographical jurisdictional area or areas of the local unions or district councils.

19.02 Work jurisdiction not described in Schedule "A" shall be settled by final determination by the Impartial Jurisdictional Disputes Board for settlement of jurisdictional disputes or its successor. Requests for a decision shall be filed by either EBA or Ontario Provincial Council hereinafter referred to as the OPC.

Any assignments made before a final determination by the Impartial Jurisdictional Disputes Board in any local area may or may not, at the discretion of the employer, be changed, but in any event the original assignment shall not be the subject of any grievance claiming damages. However, subsequent assignments shall be made in accordance with the said final determination and such decision shall remain as the established local area work practice until changed by such tribunal.

19.03 *The determination of established local area work practice under 19.01 will be placed before a committee for decision.* The committee shall be composed of three persons representing the EBA and three representing the OPC. The composition of the representatives of the committee may be changed as best suits either the EBA or the OPC to reflect the interest of the sub-trade or nature of the work in question. Applications for a committee decision will be filed with the EBA in the case of an employer or trade association and with the OPC in the case of the district council or local union. The EBA and the OPC will each process an application according to procedures exclusively adopted by each party. The committee will be convened upon the request of either the EBA or OPC and must meet and hand down a decision within five (5) days of receipt of request for a hearing. The committee may be convened for the purpose of issuing standing decisions. A decision of the committee in favour of the OPC shall secure that local area work practice for the exclusive assignment to members of the United Brotherhood of Carpenters. The employer shall immediately implement the decision. A decision against the OPC shall not require the assignment of the particular work in question to any other trade. *In the event that the committee is unable to render a decision such deadlocked decision may be subject to grievance and arbitration.* The committee shall hold its hearings in the local area where a decision was requested.

19.04 A subsequent assignment in violation of a decision mentioned in 19.02 or of a committee's decision shall be considered a violation of this Agreement subject to grievance and arbitration.

19.05 Any assignment of work that is awarded to members of the United Brotherhood of Carpenters under the provisions of this Agreement shall be acknowledged and supported by the EBA in all proceedings.

[emphasis added]

3. Schedule "A" refers to "... the cutting and placing of lagging." as part of the following description of pile driving work:

Pile driving work, including the handling, driving, bracing, plumbing, cutting off and capping of piling, sheet piling, and tie backs whether of wood, metal or concrete, regardless of size or shape, the pulling, extracting or salvaging of such piling; and *the cutting and placing of lagging.*

The placing of all whaling, spring and fender lines and guard rails of wood or metal; the framing, boring, drilling or burning of holes:

The heading and splicing of wood piling, and making of wood sheet piling; the welding, cutting or burning of metal piling; the loading, unloading, framing, erecting, dismantling and handling of drivers, derricks, cranes and other pile driving equipment.

[emphasis added]

4. One effect of this referral, as the Board observed in the interim decision, has been to place the Board in the shoes of the committee which had been established under clause 19.03 and charged with the task of determining what is the "... established local area work practice under 19.01 ...". More particularly, in this case it means determining whether there is an established local area work practice of members of Local 18 performing, within its geographic jurisdiction, the cutting and placing of lagging. If it is determined that there is such a practice, clause 19.03, in the sentence immediately preceding the second emphasized passage quoted above, purports to "... secure that local area work practice to members of the United Brotherhood of Carpenters.". The Agree-

ment purports further to protect the practice by Article 4 - Subcontracting, which provides as follows:

4.01 Any work that is the work of the Union *under the provisions of Article 19* of this Agreement shall only be sub-contracted to an employer bound by this Agreement.

[emphasis added]

For the reasons given in the interim decision, the Board concluded at paragraph 21 that a reasonable standard to apply when determining whether there is an established local area work practice would be:

... that the party seeking the determination of whether work listed in Schedule "A" is established local area work practice demonstrate to the Board by objective evidence as to the circumstances in which the work has been performed in [Local 18's geographic jurisdiction] that the evidence does or does not favour, on the balance of probabilities, a finding that employer's bound to the Agreement have recognized the United Brotherhood's claim to the work in question in that [geographic jurisdiction].

5. Another panel of the Board adopted and applied that standard in an unreported decision, *Grand Valley Construction Association*, which issued December 13, 1983, in Board File No. 2697-82-M. In that case, a sister local of Local 18 had sought a declaration that certain work set out in Schedule "A" of a successor provincial agreement to the Agreement constituted local area work practice. The Board applied the standard set out above in determining the question in favour of the applicant. The decision which issued December 13, 1983, deals with a request that the Board reconsider its decision made in favour of the applicant. The request brought into question what constituted "having recognized the United Brotherhood's claim to the work in question". The Board rejected the idea that it had to be a formalized recognition of the claim and stated that "... the proper test to be gleaned from [the interim] decision is that the evidence must show that employers bound to the agreement have recognized the United Brotherhood's *claim* to the work in question ..." (emphasis in the original). There was evidence before the Board in that case of 75 per cent of the work at issue having been done by United Brotherhood carpenters employed by subcontractors under subcontracts let by contractors bound to the carpenters provincial agreement. A minimal amount of the work had been performed by carpenters employed directly by contractors bound to the provincial agreement. The remainder of the work had been subcontracted to non-union contractors. The Board found those circumstances to constitute *de facto* recognition, by the contractors bound to the carpenters provincial agreement, of the United Brotherhood's claim to the work at issue. It is clear from a reading of both decisions in that case, that the significant element in the evidence was the performance of the work at issue by carpenter members of the United Brotherhood whether or not they were employees of the contractors bound to the provincial agreement. It is equally clear the Board did not consider to be significant the question of whether the subcontracting to contractors employing union carpenters was specific performance under clause 4.01 of the provincial agreement. The Board herein endorses those views. It is reasonable, therefore, for this Board to adopt a similar approach in determining whether there is objective evidence which, on the balance of probability, favours a finding that contractors bound to the Agreement, have recognized the United Brotherhood's claim to the cutting and placing of lagging in Local 18's geographic jurisdiction.

6. The Board heard evidence on the cutting and placing of lagging from Patrick Lynch, David Harris and Thomas Fenwick on behalf of the applicant and Arthur Burns, Robert Pearson, William E. Lardner and Angelo Valerio on behalf of the respondents. Harris described lagging as a system in deep excavations of placing piles with wooden planks or beams between them to secure the banks of the excavations, the wooden planks or beams usually being oak, eight feet or ten feet

in length, eight inches or more wide and three inches or more thick. It is the cutting to length of the planks or beams and the placing of them between the piles which is at issue in this case. The Board's decision in *Anchor Shoring Limited*, [1974] OLRB Rep. Aug. 528, at paragraphs 5 and 6, draws a more detailed description of lagging and the process of placing it. While the description was not specifically endorsed by the parties in this case, nothing turns on a precise description and the Board finds it a useful background against which to view the evidence before it. Paragraphs 5 and 6 read as follows:

5. The work in dispute is the installation of lagging type shoring. To facilitate matters we shall describe the overall process and then point out the specific aspects of the operation which are in dispute. The site is initially staked out by a survey crew, which also sets out marks along the perimeter of the site at 8 feet intervals. At these 8 feet marks a drill is used to bore a vertical 2 feet diameter hole to a specified depth. At about this time "H" beams are brought to the site and are unloaded using a crane to hoist the beams from a truck and place them on the site. The crane lowers a beam, vertically into one of the holes. (In the present case the beams were 22 feet long and having a 14" x 8" cross section.) The beam is held in a vertical position in the hole while ready mix concrete is placed in the hole to a depth of a few feet. The crane continues to hold the beam until the concrete is set. This process is repeated at each of the holes until the perimeter is surrounded by a series of "H" beams, which are referred to as soldier piles. It is important to note that the "H" beams have been positioned in the holes so that the open parts of the "H" face each other and the flat surfaces of the beam face the inside and the outside of the proposed excavation.

6. The next stage is the excavation of the site. Earth is removed by machine to the fact [sic] of the "H" beam. At this time rough cut timber is delivered to the site. The timbers are 3" thick, 8 feet long and of various widths. The material is delivered by truck to the site and is unloaded in bundles by use of a crane. The earth between a pair of "H" beams is excavated by hand or power equipment to a depth of about 5" from the face of the "H" beam. The excavation at each such bay is for a depth of approximately 4 feet. The wooden lagging is then carried to the bay and placed between the two soldier piles, the face of the two "H" beams forming a flange behind which the wooden lagging is placed. The lagging is thus built upon the excavated bay by placing one timber on top of another. This process is repeated at each bay and the over-all process can be repeated a number of times until the required depth of excavation is achieved. The end result is a wall with vertical "H" beams and planks which retain the earth at the side of the excavation. In some instances this wall later serves as the outside form when the foundation is constructed. Normally the wall is not removed except for a few feet near the top of the excavation, but remains buried in the earth adjacent to the foundation of the structure.

7. Thomas Fenwick is a business representative and one of two full-time officials of Local 18. At the time of the hearings into these matters, he had been a business representative for 20 years and was also Local 18's recording secretary. His evidence-in-chief was as follows. 80 per cent of all of the lagging which has been done within Local 18's area has been on industrial jobs, mostly at Dofasco and Stelco in Hamilton. As between lagging jobs at those facilities, Dofasco predominates. Contractors bound to the Agreement which have performed lagging work at Dofasco and Stelco are:

- (1) The Frid Construction Company Ltd.;
- (2) Canadian Engineering and Contracting Co. Limited;
- (3) Pigott Construction;
- (4) James Kemp Construction Limited; and to a lesser extent,
- (5) Barclay Construction Hamilton Limited.

When these companies have done lagging work, most of the time they have employed directly

members of Local 18, but have subcontracted the pile driving work. Fenwick has no knowledge of those companies having used persons other than Local 18 members to perform the cutting and placing of lagging at Dofasco and Stelco. Local 18 has not had any jurisdictional disputes respecting lagging jobs done at Dofasco and Stelco by those companies.

8. The remaining 20 per cent of lagging jobs in Local 18's area have been commercial jobs in downtown Hamilton, six in number at the most. While Fenwick actually testified with respect to eight projects, three arose after the filing of this referral and the parties are in dispute as to whether the Board should give them any weight. Counsel for Local 18 contends they should be given no weight or evidence of who has cut and placed lagging. That issue will be dealt with later in the decision. The five projects which were done before the filing of these matters were, according to Fenwick, two underground parking garages at Jackson Square, one for the Art Gallery and the other for the Convention Centre; the Standard Life Building; the Hamilton Police Station; and, the Bell Canada Building. Fenwick identified Pigott Construction ("Pigott") as the general contractor on the two parking garages and the police station, a company he referred to as Tricon on the Standard Life Building and Mollenhauer Construction on the Bell Canada Building. With respect to the cutting and placing of lagging on those jobs, he testified that the work on the two parking garages was subcontracted by Pigott to Deep Foundation ("Deep") on the first one and Anchor Shoring ("Anchor") on the second. Neither employed carpenters for the work and Deep used labourers to do it. Tricon employed Local 18 carpenters to cut and place shoring on the Standard Life Building. Pigott subcontracted the lagging work on the police station to Westpile who employed Local 18 carpenters for it. The Bell Canada lagging work was done by Franki Piling ("Franki") under subcontract from Mollenhauer. Franki did it with a millwright from a sister local of Local 18 and a Local 18 carpenter.

9. Fenwick's evidence-in-chief with respect to the three lagging jobs which were done after the making of this application is as follows. The jobs were the Sheraton Hotel, Vic Copps Arena and CHCH-TV. Pigott was the general contractor on the hotel and the arena. The Frid Construction Company Ltd. ("Frid") was the general contractor on CHCH-TV. Mike Pigott, a member of Local 18 and an employee of Pigott, did the cutting and placing of lagging on the arena. Angelo Gallo, another member of Local 18 and an employee of Pigott, did the cutting and placing of lagging on the hotel. Frid employed Local 18 carpenters to cut and place lagging on the CHCH-TV job.

10. When Fenwick was challenged on cross-examination that carpenters had not performed the cutting and placing of lagging on the arena, hotel and Bell Canada jobs, he denied that to be the case. He testified that Pigott was responsible for the lagging work on the arena and denied that it had been done by Deep using labourers. He testified further that the work had been performed by Mike Pigott as an employee of Pigott, and that he, Fenwick, had seen Mike Pigott doing the work unassisted by anyone. With respect to the hotel, he denied that Anchor did the lagging work and with respect to the Bell Canada job, he testified that he had seen a millwright and a Local 18 carpenter cutting and placing lagging.

11. His cross-examination also produced acknowledgement of other commercial lagging jobs in Hamilton: the Birks Building; an office tower in Jackson Square at the corner of King and James streets; the IBM Building; and, the Norwich Insurance Building. He thought Franki had been the pile driving contractor on the Birks Building but, when challenged, he acknowledged the lagging could have been done by Deep which is not bound to any collective agreement with Local 18. He was positive Deep did not do the lagging on the Jackson Square office tower. He referred to the IBM Building as a non-union job about which he had no knowledge of who worked on it. With respect to the Norwich Insurance Building, he stated that Pigott did the lagging and was gen-

eral contractor of the project. He also said that, if Anchor had done the lagging using labourers, he was unaware of that circumstance. He was also asked what he knew about lagging work in connection with the construction of service tunnels at McMaster University by Robertson-Yates Corp. Ltd. ("Robertson-Yates"). He knew Robertson-Yates had been on many jobs at McMaster and admitted the possibility lagging work might have been done on some of the tunnels, but disputed that it could have been done by Franki using labourers.

12. David Harris has been a member of Local 18 for 26 years and, for 23 of those years, worked for Frid until approximately 18 months before he testified in these matters. He was employed either as a non-working foreman or a superintendent on Frid's jobs, depending on their size, during approximately the last 15 to 18 years of his employment with Frid. 80 per cent of the time he was employed by Frid was on projects at Dofasco. Lagging was used on the majority of these projects particularly when excavation was being done inside an existing building, some other confined space, or where it was a deep excavation, which he described as 30 to 40 feet. He described lagging work as being done by crews of carpenters and labourers, with the labourers preparing the pile web to receive the lagging timbers. This involved using shovels to clean any debris from the channels of each pair of "H" piles between which the lagging was to be placed. According to Harris, one labourer could do the work, but two were used so as not to delay the carpenters who worked in pairs. He described their job as measuring between the piles, cutting the timbers and placing them in the pile web. One measures while the other cuts and both lift, carry and place the timbers. He said that it was possible but not practical to use only one carpenter. Usually he used two labourers and two carpenters for lagging work. Harris had observed Canadian Engineering, Kemp, Pigott and Barclay amongst the Local 18 contractors on Dofasco projects, but had not seen any of them performing lagging work. At the time Harris appeared before the Board he was employed by Pigott as superintendent on the Vic Copps Arena. He testified that he did not supervise the lagging work, but Mike Pigott had performed the work for Pigott between August and the end of the year.

13. Under cross-examination, Harris' testimony respecting the arena job was that he was aware of Mike Pigott being "on lagging", but Harris did not know if Mike Pigott had placed lagging and could not dispute counsel's challenge that labourers had done the placing of lagging. With respect to lagging work generally, his experience on industrial projects was that a normal lagging crew consisted of two carpenters and two labourers. The labourers' job was to clean out the web and carry lagging materials to the carpenters if it was stored too far away. The labourers normally would not help the carpenters with the cutting of lagging, but may help them with the placing of it. He agreed all four crew members were kept working as much as possible and to that end did whatever work needed to be done, but the carpenters' prime responsibility was to measure and cut the lagging and make sure it was properly placed. Fenwick testified after Harris and during his own cross-examination, he agreed with Harris' description of how crews performed lagging work on industrial jobs.

14. Patrick Lynch is the president of Westpile Inc., ("Westpile") and had held the same position with its predecessor, Western Pile and Foundation (Ontario) Ltd. He testified primarily about pile driving, but he did give some evidence about lagging work. Westpile and its predecessor has usually not taken lagging as part of its contract, preferring to leave it with the general contractor to handle as part of excavation. One of the lagging jobs Westpile did was for Pigott on the Hamilton police station. When Westpile has done lagging work it has been with a composite crew of carpenters and labourers. The labourers trim the side of the excavation before the lagging planks are placed and the carpenters trim the planks if needed. Lynch agreed in cross-examination that labourers sometimes handle materials like lagging together with the carpenters. Carpenters and labourers who do lagging for Westpile are part of the pile driving crew and when no special

skills are required, anyone on the crew will do the available work. He told the Board on re-examination that he is still able to differentiate the normal roles of the members of the pile driving crew even though they all pitch in with the work.

15. Arthur Burns has been the chief engineer for Anchor Shoring since 1973. During that period, Anchor performed three lagging jobs in Hamilton for Pigott, two prior to this application being made and one after. Burns engineered the jobs. The two jobs were an underground parking garage in Jackson Square and the Norwich Insurance Building. The third job was the Sheraton Hotel. The parking garage was done in 1975. Burns described it as the parking garage closest to the Art Gallery. Lagging was required to a depth of 30 feet on three sides of the excavation for an approximate length overall of 600 feet. It was the biggest job of the three and six to eight labourers worked in two crews. They did the hauling, measuring, cutting and placing of the lagging. No other trade was used. The Norwich Insurance Building was a 1978-79 contract to supply and install lagging on three sides of the excavation. There was approximately 220 to 240 feet of lagging and the job took approximately two weeks. The lagging was measured and cut by a carpenter supplied by Pigott and charged back to Anchor. The placing of the lagging was done by labourers. Burns was on the project once only during the two weeks, so his personal observation that the carpenter did not assist with the placing of lagging was limited to the one occasion. He was on the hotel job four times in four weeks. Anchor's work on it began after the filing of this application. The job required approximately 160 feet of lagging placed to a depth of about 18 feet. A carpenter supplied by Pigott and charged back to Anchor measured and cut the lagging. Two and sometimes three labourers hauled and placed the lagging. Burns admitted he would not know if carpenters helped place lagging when he was not on the project to observe it.

16. Robert Pearson testified about three jobs requiring lagging which Franki did in the Hamilton area since the early 1970's during which time Pearson was Franki's works manager. His evidence-in-chief about these jobs is as follows. In the early 1970's Franki did piling and lagging work on service tunnels connecting some of the buildings on the campus of the McMaster University. The work took place over a couple of months and the measuring, cutting and placing of the lagging was done by labourers. That is the only trade Franki uses on lagging. It does not employ any carpenters. Next, in the early to mid-1970's, Franki did piling, lagging and bracing for an excavation for a large office building (which later became known as the IBM Building). The building site was 200 feet square and required excavating to a depth of 30 to 40 feet. The measuring, cutting and placing was done by labourers. The lagging timbers were eight feet long, six or eight inches wide and three inches thick and took two labourers to place each timber. The third job was the Bell Canada Building. Its site was similar in area to the IBM Building and was excavated to a depth of 20 feet. Four labourers did all of the measuring, cutting and placing of lagging for the excavation.

17. When Pearson was cross-examined about the three jobs, he testified as follows. He believed the general contractor on the university job was Robertson-Yates and the piling and lagging work lasted two months, during which he visited the project six times. He could not recall where on the campus or what buildings the tunnels connected, but Franki worked only on those tunnels which required lagging. The average depth of the tunnels was 15 feet and about half the duration of the job was attributable to the lagging work. Pearson admitted he had not checked Franki's records with respect to the period when the work was done, the nature of Franki's contract or the number of employees on the project. The contract on the IBM Building was from Cutaria Investments Limited. There was lagging on three sides of the excavation and that part of the job took about three weeks. Franki had four labourers on the project. Pearson was unable to say how many labourers were performing each element of the lagging because all aspects of the work were done as a combined effort of the crew. The Bell Canada job was an office building put up in the mid to late 1970's and involved two to three weeks of lagging as part of a contract from

Mollenhauer. Pearson admitted the possibility of Franki having had a millwright on the Bell job, but saw no reason why it would have employed a Local 18 carpenter.

18. William E. Lardner, president of Deep, gave evidence about five lagging jobs which Deep did in the Hamilton area during the 13 years he had been Deep's president. One of the jobs was the Vic Copps arena. The other four were projects started prior to this application. Lardner's evidence-in-chief was based on a list of the jobs which he had had prepared for his use. His evidence was as follows. Deep had a contract to place the soldier piles and lagging for the excavation on the Birks Building. Lagging was placed on 300 to 400 feet of the excavation's perimeter to an average depth of 15 feet. Deep employed labourers for the cutting and placing of all of the lagging. In 1974, Deep did the lagging on an underground parking lot in Jackson Square for Pigott. Lagging was placed for approximately 700 feet of the foundation's perimeter to an average depth of 25 feet. Deep was on two projects in Jackson Square for Tricon, one in 1976, the other in 1981. On the earlier job, Deep placed lagging for 200 to 250 linear feet of excavation to an average depth of 20 feet. The cutting and placing was performed by labourers. Tricon did the lagging on the later job under Deep's supervision. Lardner did not say what trade was used for the lagging. Finally, Deep did the lagging on the Vic Copps Arena project for Pigott. Pigott supplied a carpenter for cutting the lagging, but Deep's labourers did much of the cutting and all of the placing. Lardner did not recall if Pigott charged back to Deep the carpenter's wages.

19. Under cross-examination, Lardner gave the following additional evidence. He recalled the Birks job as being done in 1972 with Tricon as general contractor. He could not recall whether Deep's legal contract was with Tricon, but he recalled the contract being discussed with Tricon employees. Lardner thought the lagging work took between one and a half and two weeks to complete including the back filling. Lardner's response to a challenge as to the size of the lagging crew on the parking garage job was that the size of the job was such that it would not have made sense for Deep to have used only two labourers. Lardner did not visit Tricon's 1976 Jackson Square job and was unable to say what the crew size was. While he believed Deep's contract to have been with Tricon and while he recalled discussing the contract with Tricon employees, he could not recall if Deep's legal contract was with Tricon. The 1981 Tricon Jackson Square job was the Standard Life Building. Lardner did visit that job site but did not observe what trade did the lagging work and was unable to say how long the work took. He was on the Vic Copps arena job only once in its three weeks duration. He did not recall the size of the lagging crew.

20. Angelo Valerio who was employed by Deep on the arena job testified on behalf of the respondents. He was on the job for seven weeks doing lagging work. When he began work, he was one of four labourers working on it for Deep. There were no carpenters working for Deep at that time. About three weeks later, a fifth labourer came on the job and about the same time Mike Pigott was assigned to measuring and cutting lagging. Prior to that, the labourers were trimming the excavation walls, measuring, cutting and placing lagging. It was Valerio's first lagging job. He and the other three labourers were shown by Deep's superintendent how to measure and cut lagging. After Mike Pigott was assigned to measuring and cutting, the labourers continued to do some of that work. Mike Pigott was replaced later in the job by another carpenter, but there was only one carpenter at any particular time. Sometimes the carpenter helped placing the lagging, but with Pigott, this was only when it was low. His size prevented him from helping when lagging had to be lifted above a certain height. Valerio was emphatic in stating that Pigott had not placed any lagging by himself and could not because of the weight of the timbers, which Valerio estimated to be approximately 120 pounds each. Some of the lagging work had been done when Valerio began on the arena job and he was employed on lagging work for four of the seven weeks he worked on the job.

21. Before assessing the foregoing evidence to determine whether it satisfies the standard set out at the end of paragraph 4 herein and adopted in paragraph 5, it is useful to reiterate that the Board is dealing with the referral of a grievance in the construction industry under section 124 of the Act and not, as it might appear from the evidence, with a work jurisdiction dispute between two unions, the Carpenters and Labourers, under section 91 of the Act. The Board's task as an arbitrator in this case is the same as the task given to a committee struck under clause 19.03; that is "[t]he determination of local work area practice under 19.01". Clause 19.03 also speaks in the following manner to the effect of a committee decision:

A decision of the committee in favour of the OPC shall secure that local area work practice for the exclusive assignment to members of the United Brotherhood of Carpenters. The employer shall immediately implement the decision. A decision against the OPC shall not require the assignment of the particular work in question to any other trade.

It is reasonable to construe the words "[a] decision ... in favour of the OPC ..." within the context of Article 19, to mean a decision of the committee that there is an established local area work practice of carpenters performing the work in question. Where that is the committee's decision, the Agreement purports to require an employer to assign that work exclusively to the carpenters. On the other hand, the Agreement purports not to require an employer to assign the work to any particular trade where the committee's decision is that there is no established local area work practice. Since the Board's task as an arbitrator under clause 19.03 is the same as a committee, it follows that the Board's decision would have the same effect as a decision of a committee. In the context of the instant case, a decision that there is an established local area work practice of carpenters performing the cutting and placing of lagging would in the words of clause 19.03 secure that work for the exclusive assignment to members of the United Brotherhood of Carpenters, whereas a decision that there is no established local area work practice, would not require contractors bound to the Agreement to assign the work to the Labourers or, for that matter, to any other trade.

22. The standard and approach adopted by the Board in paragraph 5 herein clearly places on Local 18 the burden of demonstrating to the Board, by means of objective evidence of how cutting and placing of lagging has been performed in Local 18's geographic jurisdiction, that there is an established local area work practice of carpenters performing that work. In order for Local 18 to be successful, its evidence herein, on a balance of probability, must favour a finding by the Board that contractors bound to the Agreement have recognized the claim of the United Brotherhood of Carpenters and Joiners of America in Schedule "A" of the Agreement to the cutting and placing of lagging within Local 18's geographic jurisdiction. The Board turns now to that evidence.

23. The Agreement is a collective agreement which pertains to construction work in the industrial, commercial and institutional (ICI) sector of the construction industry. Fenwick testified in chief that 80 per cent of lagging work in Local 18's area has been done in the industrial segment of the ICI sector. Most of this work has been at Dofasco and Stelco in Hamilton, with work at Dofasco predominating between those two. He named five contractors as having performed lagging work at Dofasco and Stelco. The Board has Harris' evidence that 80 per cent of the 15 to 18 years that he worked for Frid in a supervisory capacity was spent at Dofasco where the majority of jobs he worked on involved lagging. His evidence-in-chief that, on those jobs, carpenters did all of the cutting and placing of lagging was altered on cross-examination only to the extent of acknowledging that labourers could assist carpenters with the placing of lagging and that all members, carpenters and labourers, of a lagging crew try as much as possible to keep working.

24. There is no evidence before the Board of lagging work on industrial construction sites by the other four contractors named by Fenwick. Harris testified that he had not observed them doing lagging work while he was at Dofasco. Nor is there any evidence which suggests Frid's expe-

rience with lagging work is representative of the other four contractors. As a result, the only evidence the Board has respecting lagging work performed on industrial construction sites by the Canadian Engineering, Pigott, James Kemp and Barclay companies is Fenwick's evidence. It was that, most of the time when they did lagging work at Dofasco and Stelco, they employed members of Local 18 for that work; he had no knowledge of them employing other than Local 18 carpenters to do the cutting and placing of lagging; and Local 18 had not had any jurisdictional disputes about those companies doing lagging work at Dofasco and Stelco. None of Lynch's evidence about lagging related to industrial construction.

25. Thus the Board has before it only general statements that 80 per cent of the lagging work performed in Local 18's area has been on industrial projects and the cutting and placing of lagging on those projects has been performed by carpenters. Those statements are not substantiated by any *viva voce* or documentary evidence as to the specific lagging projects undertaken; which of the contractors bound to the Agreement was responsible for performance of the work; the size of the projects; the crew make up; and how the lagging work was done. That kind of evidence would permit a reasonable analysis and assessment of how the cutting and placing of lagging has been performed. By way of example, a useful comparison can be made with "area practice" evidence in a jurisdictional dispute. As the Board noted in the interim decision, area practice is one of several criteria applied by the Board in resolving competing work jurisdiction claims. The Board weighs the evidence relating to each criteria to see if it favours the claim of one trade or the other, or for that fact, neither. The evidence in respect of area practice will include the kind of detail referred to above. Typically it takes the form of what has come to be known in the construction industry as job lists. Also typically, the job lists are supplemented by *viva voce* evidence. As a result, the Board usually will have before it evidence sufficiently specific as to enable it to decide whether area practice favours one trade or another in the dispute. Even when that evidence lacks precision as to its detail, it would permit a more reasonable analysis and assessment of the area practice than would broad generalizations. For example, in the extract from the Board's decision in *K-Line Maintenance and Construction Limited*, [1979] OLRB Rep. Dec. 1185 quoted at paragraph 21 of the interim decision, while the Board found the area practice evidence to be wanting in precision, the Board was still able, on a balance of probability, to conclude that it favoured one trade. The Board herein is not faced with favouring one trade over another, but it is faced with deciding, on a balance of probability, whether the evidence favours a finding that contractors bound to the Agreement have recognized Local 18's claim to the cutting and placing of lagging. The burden of satisfying the Board is Local 18's and it seems to the Board, therefore, that it was incumbent on Local 18 to come before the Board with evidence sufficiently detailed about the circumstances in which the work has been performed to satisfy the Board. This should not surprise Local 18. It is quite clear from the interim decision that the standard formulated by the Board had its roots in the standard of proof applied by the Board respecting the area practice factor in a jurisdictional dispute. The Board appreciates that the degree of detail which can be achieved will be influenced by a variety of factors, particularly the impact of the passage of time on the availability of documentary evidence and on witnesses' recall. No doubt that was a factor in this case. Some of the witnesses were testifying to events which took place 15 to 20 years prior to giving their testimony. The Board can make allowances for that in weighing the evidence. It cannot make allowances for a total absence of detail.

26. Having regard to the foregoing, the Board is not satisfied that the evidence before it with respect to the cutting and placing of lagging on industrial construction sites favours a finding that contractors bound to the Agreement have recognized Local 18's claim to that work. It follows, therefore, that the Board is not satisfied that there is an established local area work practice within the meaning of clause 19.01 of the Agreement respecting the cutting and placing of lagging in the industrial segment of the ICI sector of the construction industry.

27. The evidence respecting lagging projects in the commercial segment of the ICI sector was somewhat more specific than the other evidence, at least to the extent of identifying specific projects, which contractor was ultimately responsible for the lagging work and which contractor or trade did the cutting and placing of lagging. Even so, the evidence does not assist Local 18's claim. First, if the Board were to accept Fenwick's evidence that 80 per cent of the lagging work has been done on industrial projects, since this application relates to the whole ICI sector and not to its individual parts, the Board's finding above would make the evidence about commercial projects redundant. But even if all of the lagging done in the Hamilton area had been on the commercial projects in evidence herein and putting Local 18's evidence at its highest, it would not support a finding that there was an established local area work practice within the meaning of clause 19.01 of the Agreement. If the Board accepts the argument of Local 18's counsel that it should disregard the jobs which started after these proceedings and the IBM Building because, in Fenwick's words, it was a non-union job, the remaining projects about which the Board has evidence are: the two underground parking lots in Jackson Square; Standard Life Building; Bell Canada Building; Hamilton Police Station; 1976 Jackson Square office tower; Norwich Insurance Building Birks Building and McMaster University. The Board will not give any weight to the last two projects because it cannot determine from the evidence which contractor was responsible for the lagging work on the Birks Building and Pearson's evidence about jobs Franki Piling did at McMaster was so lacking in relevant detail as to cause the Board not to rely on it. Of the remaining projects only the evidence respecting the Standard Life Building and the Hamilton Police Station favour a finding that the contractors recognized Local 18's claim to the cutting and placing of lagging. The two parking garages were the largest of the seven projects and the evidence respecting the cutting and placing of lagging on them, together with the evidence respecting the Bell Canada Building, the 1976 Jackson Square office tower and the Norwich Insurance Building does not favour a finding that the contractors recognized Local 18's claim to the cutting and placing of lagging.

28. Therefore, having regard to all of the foregoing, the Board is not satisfied that contractors bound to the Agreement have recognized the claim of the United Brotherhood of Carpenters and Joiners of America to the cutting and placing of lagging in Local 18's geographic jurisdiction. Accordingly, the Board finds that there is no established local area work practice within the meaning of clause 19.01 of the Agreement respecting the cutting and placing of lagging.

29. This application is dismissed.

2372-85-R; 2402-85-U Service Employees Union, Local 210, Affiliated With Service Employees International Union, AFL-CIO-CLC, Applicant/Complainant, v. Keytours Inc., Respondent, v. Group of Employees, Objectors

Constitutional Law - Company engaged in business of setting up and marketing air and rail tour packages - Tours sold on a wholesale basis to Ontario and U.S. travel agents - Some tours leave from U.S. to destinations in Ontario and outside Ontario - Business requiring some employees to travel outside Ontario on regular basis - Out-of-province services provided by persons other than employees of company - Whether business integral part of federal work or undertaking - Whether itself an "extra-provincial" work or undertaking - Whether "connecting" or "extending" beyond the province

BEFORE: *Robert J. Herman*, Vice-Chairman, and Board Members *W. G. Donnelly* and *W. F. Rutherford*.

APPEARANCES: *John Pistor*, *Gerald Durocher* for the applicant/complainant; *Frank Fazio*, *Glen Mullins* and *Steve Djelebian* for the respondent; *Anna Vannelli* and *Maureen Greenwood* for the group of employees.

DECISION OF THE BOARD; July 7, 1986

1. The name of the respondent is amended to read: "Keytours Inc."
2. This is an application for certification and a complaint filed pursuant to section 89 of the *Labour Relations Act*.
3. The respondent has challenged the jurisdiction of the Board to entertain these proceedings, and asserts that its business is within federal jurisdiction and these proceedings ought to be brought before the Canada Labour Relations Board. Before embarking upon any inquiry into the merits, the Board entertained evidence and submissions with respect to this preliminary constitutional issue.
4. The parties agreed that these two proceedings ought to be consolidated if the Board did find that it had the proper jurisdiction. For the reasons given below, we find that this Board has the necessary jurisdiction to entertain them and, accordingly, we hereby direct that these two proceedings be consolidated.
5. The respondent sets up and markets air and rail tour packages, primarily selling these packages on a wholesale basis to other travel agents, with its retail sales being steadily phased out. The only office operated by the respondent is located in Windsor, Ontario. When the respondent decides to put together a new destination package, a senior officer or officers of the respondent travel to that destination, ordinarily outside the province. While there, that employee assesses whether the destination will be an attractive one for potential buyers and inspects the various accommodation options, local tours and sight-seeing events, transportation arrangements and so on. After assessing the facilities and services available and the cost required to utilize them, the employee returns to the Windsor office where a decision is made whether to set up the particular destination package. If the proposed destination on balance seems attractive, the respondent, through its employees, and in the Windsor office, puts together the various contractual arrangements in order to provide a complete package available for sale to travel agents and ultimately to the consumer who takes the trip. These package tours depart at various times during the week, with all air tours leaving from the Detroit airport to destinations outside the Province of Ontario, and the rail tours either leaving from locations within the United States and entering the Province of Ontario, or alternatively, both leaving from and arriving entirely within the Province of Ontario.
6. In essence, the respondent purchases bulk space from both a common air carrier and from Via Rail or Amtrak and in turn the respondent utilizes this bulk space to compose its package tours. The respondent is regulated by the various levels of government, both Canadian and International, and holds numerous licences issued by provincial, federal, American or International agencies or commissions. Together, these licences enable the respondent to run its business and to offer package tours which go beyond the confines of the province. The respondent is licenced under the *Travel Industry Act*, R.S.O. 1980, c.509, as a retail and wholesale travel agent, it holds a licence as a general sales agent for Via Rail, and is subject to the regulatory control, where applicable, exercised by the International Air Transport Association (I.A.T.A.) authorizing the respon-

dent to sell its charters internationally, and by the United States Federal Department of Transportation, which authorizes the respondent to contractually arrange for its charter air flights.

7. The Articles of Incorporation, as amended, of the respondent indicate the following as its objects:

To conduct the business of a general travel agency, on a wholesale and on a retail level and, without limiting the generality of the foregoing, to buy, sell, exchange and otherwise deal in and with train, steamship, airplane and other tickets, and to arrange for hotel accommodations and travel tours of all kinds.

In the Board's view these objects accurately reflect and describe the business conducted by the respondent, on the basis that the arranging of hotel accommodations and travel tours includes the setting up and composing of the package tour itself. Put differently, the package tours offered by the respondent, with their specific dates, times of departure and hotel accommodations, only exist as a specific package tour because the respondent has assembled the tour. Unlike most other travel agents, who sell tours which have been assembled by other corporations or individuals, Keytours Inc. sells tours which it has assembled itself.

8. During the past year, approximately one hundred thousand people purchased one of the respondent's rail tours. Most of these passengers were resident in the United States and bought their tickets from within the United States. The tour packages involving air flights carried approximately ninety-five thousand passengers during the same period, of whom approximately ninety per cent were resident in the United States. As noted earlier, most of these passengers bought their tickets from other travel agents, and it is those agents which are the regular customers of the respondent.

9. The tours currently offered by the respondent involving air flights have destinations in Las Vegas, the Bahamas, and several Florida locations. All of the flights leave from the Detroit airport, as noted above, and all of them utilize planes owned by American Trans Air and leased through a charter contract with the respondent. American Trans Air is a common carrier based in the United States. For each one of the flights during a given week, the respondent must arrange a charter contract with American Trans Air, and also arrange that funds in a specified amount be deposited in an escrow bank account in an American city, as required by the United States Department of Transportation. In effect, that Department of Transportation requires that the respondent post a bond for each of the flights leaving from the Detroit airport. There is no requirement that the respondent charter planes from American Trans Air, and for any given charter flight the respondent could choose to lease or charter a plane from another air carrier. For practical reasons, because the respondent is such a valued customer of American Trans Air and therefore receives very attractive fee schedules from them, the respondent charters only from this one air carrier.

10. In signing a contract for a particular charter, the respondent is in effect purchasing in bulk all the seats for a given flight leaving at a specific time and arriving at its destination at a specific time. The respondent in turn uses this seat capacity to assemble its package deals. If the various travel agents selling the respondent's tours should not fill up a plane, the plane nevertheless travels to its destination though seats remain unsold and unfilled. The individual charter contracts make clear that the flight times are finalized by American Trans Air only thirty days prior to the scheduled flight date.

11. The air tickets are American Trans Air tickets, issued by the respondent, and obtained by passengers from whichever agent they might have bought the tour. For tours going to destinations other than Las Vegas, several hours before the plane is scheduled to depart from the Detroit

airport, one or two employees from the Windsor office travel to the Detroit airport carrying with them the passenger manifest, a list of names of the passengers travelling on the particular flight about to leave. When they arrive at the Detroit airport, the respondent's employees hand over the passenger manifest to employees of an unrelated corporation, Butler Aviation, hired by the air carrier American Trans Air to provide all ground services. Butler Aviation checks all passengers in, and does all the ground handling of their package. The employees of the respondent, in addition to bringing the passenger manifest from Windsor, are present to ensure that there are no problems and to respond should passengers have any inquiries. On occasion these employees will perform a short cursory inspection of the passenger area of the airplane to ensure that it is clean, and where Butler Aviation might be encountering problems in the quick processing of passengers, the respondent's employees may assist physically in the loading of the baggage. The evidence indicated that these tasks were performed on the odd occasion and in an effort to assist American Trans Air or Butler in the performance of their contractual duties.

12. The non-Las Vegas flights then depart for their various destinations, and no employee of the respondent is on those flights. When the flights arrive at their Florida or Bahamas destinations, their baggage is unloaded and the passengers are marshalled through customs, baggage reclaiming, and transported to their various hotels by employees of other corporations. No employees of the respondent are either retained or present in the Bahamas or Florida to assist the disembarking passengers.

13. Flights going to Las Vegas operate somewhat differently. The passenger manifest is not carried over to the Detroit airport by an employee of the respondent, but rather is picked up in Windsor by an employee of Bob Neugebauer Travel Services, a company hired by the respondent, on a commission basis. At least one employee of Bob Neugebauer Travel Services also takes the Las Vegas flight with all the passengers, during which that employee attempts to sell tickets for various tours or attractions in Las Vegas. One seat is provided on each flight for this employee of the Travel Service, and any additional employees of the Travel Service who might take the flight must pay for their seats. Once the flight arrives in Las Vegas, deplaning and baggage handling is handled by employees of an unrelated corporation which has been hired by Keytours Las Vegas Inc., a corporation separate and distinct from the respondent. All the services performed in connection with all Las Vegas flights, from the picking up of the passenger manifest in Windsor to the deplaning in Las Vegas and the transportation to the relevant hotels, and to the return to Detroit, are all performed by corporations retained by the respondent, either directly or indirectly, and in no respect by any employees of the respondent. Additionally, all profits made in the Las Vegas tours, the majority of air tours run by the respondent, accrue to the Las Vegas corporation.

14. As is inevitable in the travel industry, there have been delays on occasion with respect to some of the flights offered by the respondent. Where the delays have been caused by mechanical problems with the airplane, American Trans Air is solely responsible for any compensation due to passengers. On the one occasion where evidence was led with respect to a delay caused by weather problems, the compensation paid to passengers was split, with American Trans Air paying approximately sixteen thousand dollars and the respondent paying approximately three to four thousand dollars of the compensation eventually paid.

15. While the air package tours are assembled by the respondent, the individual aspects of that tour are for the most part carried out by corporations under contract with the respondent to perform specified services. As the president of the respondent indicated in testimony, "a number of components carry out individual jobs as designated. We keep it all together."

16. With respect to rail tours, of the approximately one hundred thousand passengers who

took one of these tours during the past year, roughly eighty-five thousand of those passengers boarded Via Rail trains in Ontario for destinations similarly contained within the Province. Roughly ten thousand passengers boarded trains in the United States for destinations either in the United States or in Ontario. The respondent formerly had rail tours going to the cities of Montreal and Quebec City, but as of December 1, 1985 those tours had largely been phased out with scant prospect of re-establishing them. Although an employee of the respondent attends regularly at the Windsor train station to assist passengers in boarding the trains, there was no evidence that any employee had attended at the Detroit train station during the previous two years.

17. Train seats are bought by the respondent in bulk from either Amtrak in the United States, or Via Rail in Ontario and in turn those seats form part of the packages offered by the respondent for sale to the passenger. Unlike unutilized air seats, the cost of which must be borne by the respondent, the respondent is liable to Amtrak and Via Rail only for those seats which it is actually able to sell. Also unlike the charter air flights, the rail seats are sold for regularly scheduled trains. The advantage to the passenger is attractive pricing obtained by the respondent because of the number of tickets it sells, and the ability to buy an entire package, rather than only a rail ticket. Similar packages would be available from other travel agents, or from the rail carriers themselves. As with the air packages, rail packages might include hotel accommodation and local tours or entertainment, and tickets for the rail tours are sold by travel agents who have connections with the respondent.

18. All employees of the respondent are based in its Windsor office. Most of those employees never leave the Windsor office and are involved in different aspects of the business, taking reservations from travel agents or individual passengers, working on the necessary documentation, inventory control of seating and tour capacity, group sales, accounting, and a small computer department. Some aspects of the business do involve extra-provincial travel. One individual regularly travels between Windsor and Detroit, acting as a "runner", picking up and delivering mail to the Detroit post office box, or carrying various materials from one side of the border to the other. Another individual is on the road from Tuesday to Friday most weeks, usually in the United States, servicing travel agents who sell the respondent's packages or soliciting others to do so. As noted earlier, one or two of the respondent's employees will travel to the Detroit airport, for a non-Las Vegas flight, to deliver the passenger manifest to the ground handler, Butler Aviation, and to assist in other aspects where needed. One or both of the owners or chief officers of the respondent will travel to the various international destinations, both when inspecting new destinations in order to assemble new package tours, and in order to inspect and supervise the flights and packages to existing destinations. Except for these various activities, all services are performed in the Windsor office, including the assembling of all tours, the signing of all contracts, the receipt of all payments, and all accounting, reservations, and mail.

19. Based on these facts, the respondent argues that it is beyond the jurisdiction of this Board because it either:

(a) is integral to a federal work or undertaking, specifically air or rail travel;
or

(b) is itself engaged in an "extra-provincial" undertaking.

20. The first ground relied upon by the respondent is clearly set out by the Supreme Court of Canada in *Montcalm Construction Inc. v. Minimum Wage Commission, et al* (1979), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754. The Court there stated that the provinces generally have jurisdictional competence over matters of labour relations, but that matters ordinarily within provincial jurisdiction may come within Federal labour relations jurisdiction if it can be shown that the busi-

ness functionally forms an integral part of a subject over which there is primary federal authority. Section 92(10)(a) of the *Constitution Act* provides, in part, as follows:

In each Province the Legislature may exclusively make laws in relation to ...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

Section 91(29) of the same Act provides that the subject matters excluded under section 92(10) are within the jurisdiction of the Federal Government and the Parliament of Canada. Although labour relations are ordinarily a matter of provincial jurisdiction, the jurisprudence makes clear that a business or undertaking which is found to be an "integral" part of a federal work or undertaking falls within the exclusive jurisdiction of Parliament.

21. The focus of our inquiry concerning whether the respondent's operation is "integral" to a federal work or undertaking was nicely summarized in *Canadian Telecommunications Group*, [1985] OLRB Rep. Feb. 182 at pp. 187-8:

16. The most appropriate starting point for an examination of this issue is the following passage from the judgement of Mr. Justice Dickson (as he then was) in *Northern Telecom Ltd., v. Communications Workers of Canada et al.*, (1979), 98 D.L.R. (3d) 1, 28 N.R. 107 ("Northern Telecom No. 1") at pages 13 to 15 D.L.R., 123 to 127 N.R.:

The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's *Canadian Constitutional Law*, 4th ed. (1975), p. 363:

In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry of enterprise ...

In an elaboration of the foregoing, Mr. Justice Beetz in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1, set out certain principles which I venture to summarize:

(1) Parliament has no authority over labour-relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of “a going concern”, without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

A recent decision of the British Columbia Labour Relations Board, *Re Arrow Transfer Co. Ltd.*, [1974] 1 Can. L.R.B.R. 20, provides a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the Courts look at the particular subsidiary operation engaged in by the employees in question. The Court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as “vital”, “essential” or “integral”. As the chairman of the Board phrased it, at pp. 34-5:

In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

22. It simply cannot be said that the respondent’s business is in any way “integral” to the operation of an air or a rail service. The respondent in utilizing the services of American Trans Air, or alternatively Via Rail or Amtrak, is utilizing the services to serve its own ultimate customers, the paying passengers, and not to service the air carrier or rail companies. All trains utilized by the respondent for their package deals would leave at the same times, serving the same destinations and on the same schedules, with or without the respondent’s business and participation. Insofar as the train companies are concerned, the respondent is in no different position than any travel agent, selling seats on their trains for use by passengers. Because of the volume of sales by the respondent, both the Via Rail and Amtrak apply a special pricing policy to the respondent’s purchases, but that cannot reasonably be said to amount to an “integral” relationship with their services.

23. Similarly, American Trans Air owns and operates the planes, serving not only the respondent but other customers. The respondent merely charters its planes for various charter flights. If the respondent were correct in its submission that such inter-relationship with American Trans Air must mean that the respondent’s operations are so closely connected as to attract federal labour relations jurisdiction, then a provincially regulated company which charters a plane for a flight, whether intra-provincial or extra-provincial in destination, would be exempt from provincial regulation. Similarly, bulk purchasing seats on a Via Rail journey would effectively exempt an employer from provincial regulation.

24. The Board considered a similar question in *Ottor Freightways Limited*, [1975] OLRB Rep. Jan. 1 wherein it stated, at paragraph 12:

However, in the case before us Canadian Pacific Railway has not sought out the respondent and engaged it to perform an integral aspect of the railway’s responsibilities. Rather, the respondent is primarily engaged in servicing its own customers (i.e., delivering their goods, etc.) and it has chosen to do this, in part, by rail as opposed to “over the road”. Therefore while Canadian Pacific Railway obviously enjoys such patronage it is in no way an integral part of its operations. It is convenient but is in no way necessary or integral to the operation of a railway. In other words while it is convenient to the railways to have only one customer the primary purpose or benefit of freight forwarding is to serve the many customers who deal with the freight forwarders, and therefore the benefit flowing to the railways is only of a tertiary nature. (This perspective is very nicely developed in relation to airline limousine services in *Re Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board et al*, *supra*, p. 277.) Accordingly an enterprise cannot parasitically and unilaterally make itself an integral part of a federal undertaking unless

it is performing a service that is of a primary value to that undertaking and requested by the federal undertaking on that basis. In the facts before us the respondent has merely agreed to transport *its* customers' goods to some other geographical point and has elected to do this by rail. It could have elected to do it by truck or by air but chose the rail. This election is to its own benefit and convenience and is not an integral part of Canadian Pacific Railway's activities. (Canadian Pacific Railway is only a passive medium in the relationship with the respondent.)

25. While the respondent needs various licences, both federal and international, in order to conduct its business, the business does not become federal in nature merely because it is regulated by an extra-provincial regulatory authority. While such licences are one factor to be considered, the focus of our inquiry must remain upon the nature of the business itself, and what the business actually does, rather than focusing on the regulatory authorities involved. As the Board stated in *Canadian Telecommunications Group, supra*:

20. The business of a customs broker is one which would not exist but for customs and excise legislation, matters within federal jurisdiction. It is necessary to obtain a license from the federal taxation authorities in order to act as a customs broker. The day-to-day aspects of the undertaking of a customs broker are greatly influenced by extensive federal regulations. In the course of this business, a customs broker regularly collects and remits taxes to Revenue Canada. In *Kuehne & Nagel International Ltd.*, [1979] 1 Can. L.R.B.R. 156, the respondent customs broker disputed the jurisdiction of the B.C. Labour Relations Board on the basis that the factors just recited brought its operations within federal jurisdiction for all purposes, including labour relations. The B.C. Board rejected that argument. In its reasons it cited *Re James Enterprises Ltd.*, and *Manitoba Labour Board*, [1971] 21 D.L.R. (3d) 1 (Man. Q.B.), which held that the comprehensive federal supervision of the pari-mutual system associated with an employer's race track business did not exclude the application of provincial labour legislation to that employer and its employees. The B.C. Board had this to say at page 167 of its decision:

To appreciate the proper effect of this close supervision by Parliament of the customs brokerage business, it is of assistance to return again to the decision in *Re James Enterprises*. After reciting the detailed and extensive nature of the federal supervision of the operation of the pari-mutual betting system, Wilson J. goes on to say:

I cannot agree, because of the federal power of supervision to that extent, the minister's control over the affected employees must extend to wages, hours of work, holidays and the many other matters ordinarily associated with the notion "conditions of employment".

(at page 9)

Following an examination of several authorities, the judgment concludes with this observation:

But of the instant case, the terms and conditions of employment of these employees is a matter quite apart from compliance with the federal regulations in question, nor are they to be regarded as a "facet" of the supervision deemed necessary to police the observance of those regulations. And so, provincial legislation touching upon such matters as wages, hours of work and the like have an "independent constitutional value" which persists unaffected by the existence of other (federal) rules not in conflict, and having another purpose to serve.

(at page 12)

The reference in this passage to the "independent constitutional value" of the employment relations in question in that case is, of course, a reference to the oft-quoted passage from Laskin's *Canadian Constitutional Law* which was set out in Part III of this decision:

... Insofar as such relations have an independent constitutional value they are within provincial competence....

With very few specific exceptions which flow out of certain heads in Section 91 of the B.N.A. Act, the employment relations in all service industries have an independent constitutional value and are thus provincially regulated. The small number of exceptions are typified by Parliament's legislative authority over banking. In that particular service industry, employment relations do not have an independent constitutional value; rather, they are but a facet of the banking industry over which Parliament has the exclusive legislative authority by virtue of head 15 of Section 91. But it is a mistake to assume that because a service offered by an employer relates to or is somehow connected with a branch of the Federal Government, the employment relations of that employer lose their independent constitutional value. If that were so, then an employer whose employees offer counsel or advice in relation to Federal income tax laws and, to carry the analysis to its absurd extreme, a lawyer offering advice and legal services to clients in relation to all manner of federal agencies and programs, would be subject in their employment relations to the Canadian Labour Code. The point is that the services offered by such employers, like the services offered by a custom-house broker, are extended and provided to the public. The services are not conceived nor made available for the purpose of becoming or being an indispensable cog in the great wheel of the Federal Government; the Federal Government is quite capable of carrying on its functions in the absence of the employers and their employees who may earn a livelihood by assisting members of the public in their relations with the Government.

...

26. The freight forwarding business which was the subject of the Board's inquiry in *Ottor Freightways Limited*, *supra*, similarly required extra-provincial licenses, granted both by Ontario and Quebec authorities. Again, the requirement that the respondent obtain and operate pursuant to these licenses or regulatory authority cannot detract from a jurisdiction that this Board would otherwise have. If that were true, every travel agent, regulated in part by I.A.T.A., would be under federal jurisdiction. So too would be every corporation which remits taxes to Revenue Canada.

27. Both parties referred to and relied upon *Re Canadian Air Line Employees' Association and Wardair Canada (1975) Ltd. et al.*, 1979, 97 D.L.R. (3d) 38, a decision of the Federal Court of Appeal. Wardair was involved in the air carrier business, transporting passengers by air under regulations which compelled Wardair to have other companies sell its seating capacity. A separate corporate entity, Intervac, related to Wardair, was a tour operator which acquired from Wardair the rights to market its seating capacity, as well as the seating capacity of various other air carriers. Intervac in turn sold the seating capacity on Wardair through travel agencies and through its own employees, the subject of the application for certification involved in the Federal Court of Appeal proceedings. It was clear that the air carrier business or undertaking was carried on solely by Wardair or another charter operator, and not by Intervac itself. As the Court stated in that case, at page 43 et seq.:

... as I understand the law, where *something* is done as an integral part of the operation of a federal work, undertaking or business and that something is *reasonably incidental* to such operation, it may be regulated by Parliament as part of the regulation of that work, undertaking or business even though it is not *essential* to the operation of such a work, undertaking or business; but where such a thing is made the subject of a separate local business or businesses, it cannot be regulated by Parliament merely because, if it were done as an integral part of operating a federal work, undertaking or business, it could, as such, be regulated by Parliament.

I turn to considering the question raised by this s. 28 application.

If the operator of an air carrier business has its own staff to "sell" directly to potential passengers, such selling operation would ordinarily be an integral part of the air carrier business. However, where, as here, the air carrier, as it is required to do by regulation, sells its space "whole-

sale" to somebody who "retails" it, the selling activities of the air carrier cease when it has sold what it has to sell and the sale by the wholesaler is a local activity in the province where it occurs.

While it is not too clear to me on the evidence as to how it is accomplished, what Intervac does is make arrangements with Wardair, and to a lesser extent with other air carriers, whereby it acquires the right to confer on its customers the right to be passengers on the air carrier's aeroplanes. In my view, its position, as between the air carrier and the passengers, is not different, from a constitutional point of view, from the position of any ordinary travel agency....

28. There are differences between the business of the respondent and that of Intervac as described in the Intervac decision, but those differences are not significant in our view. The respondent itself hires the common air carrier and enters charter contracts with that carrier. The respondent is licensed by various extra-provincial authorities, or alternatively, is subject to their regulatory authority. Passengers who took a tour sold by Intervac were presumably under the impression they were taking a Wardair tour. In the instant case, the evidence suggests that passengers taking packages offered by the respondent, regardless of what corporation or entity was servicing a particular part of the tour, were under the impression that these were the respondent's tours. The passengers were constantly reminded of this fact, for sound business and marketing reasons, and signs with the respondent's name and logo upon them were at the airport and Windsor train station to advise passengers where to check in. The fact that these packages in their entirety are marketed as the respondent's tours, and passengers embarking upon them perceive them to be respondent's tours, does not change the nature of the business involved. For the reasons noted, it simply cannot reasonably be maintained that the respondent's business itself is integral to a federal work or undertaking, and we accordingly decline to find that its operation is so integral as to deprive this Board of jurisdiction over the regulation of its labour relations.

29. We turn now to the second ground raised by the respondent, that the respondent's business itself is an "extra-provincial work or undertaking" and therefore exempt from provincial jurisdiction. The respondent bases this ground upon several factors. The package tours would not exist unless employees of the respondent travelled to international locations to scout out those locations. Employees of the respondent regularly attend at the Detroit airport to bring a passenger manifest to Butler Aviation for Butler to use in assisting with the boarding of passengers. Those employees of the respondent assist Butler where necessary, on occasion inspect the planes, and also on occasion pick up questionnaires filled out by returning employees, dealing with comments or complaints about the trip just completed. One of the respondent's employees regularly travels between Detroit and Windsor carrying mail and other documents or parcels between those two locations. The respondent maintains a post office box in the United States, literally dozens of escrow bank accounts as required for its charter flights, and has on retainer a U.S. attorney. One of the salesman employees travels regularly throughout parts of upper United States, calling on various travel agents in efforts to entice them to sell the respondent's tours or to service those agents who are already so doing. The respondent heavily promotes its tours to an American market, including attendance at various American trade fairs and other promotional events. The respondent submits that its flights and tours are the respondent's flights and tours and passengers view the tours as being offered and run by the respondent. The companies hired by the respondent are based outside the Province of Ontario, either in Detroit or other American or international locations, and perform the service components at those locations (for example, they assist the passengers in boarding, disembarking, and the handling and carriage of their baggage). The individuals involved in the performance of passenger services are, without exception, employees of other corporations and not of the respondent. The respondent also submits that the fact it is under the regulatory control, and holds licenses from, various extra-provincial agencies or commissions also must mean that the respondent's business is itself extra-provincial in nature.

30. Before considering some of the numerous cases relied on by the parties, we should comment on the way the respondent characterized its second ground for asserting that its labour relations fall within federal jurisdiction. The respondent asserted that its business is itself an “extra-provincial” work or undertaking. In our view this characterization reflects a misconception of subsection 92(10)(a) of the *Constitution Act* (*supra*, 20). This subsection places within federal jurisdiction those types of “lines of steam ... and other works and undertakings” which “connect” Ontario with other provinces or which “extend” beyond the limits of Ontario. The test is not whether the business is engaged in “extra-provincial” activity, but whether the business is one which “extends” or “connects” beyond the province. A business carrying on its affairs in locations including those outside the province would be conducting an extra-provincial business (or work or undertaking), but might not be carrying on the business of “extending” or “connecting”, and thus it would remain subject to provincial labour relations regulation.

31. With this in mind, we turn to the jurisprudence. Several of the cases referred to by the parties were dealt with by the Board in *Canadian Telecommunications Group*, *supra*. As the Board stated therein:

31. The decision of the Federal Court of Appeal in *Wardair* refers to that court’s earlier decision in *Re Cannet Freight Cartage Ltd., and Teamsters Local 419* (1975), 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, where that court considered the position of another enterprise interposed between a federal undertaking and its customers. In *Cannet* the enterprise in question was that of a freight forwarder, which solicited freight from customers and arranged with the Canadian National Railway (“C.N.”) for transportation of the freight in carload lots. Cannet employees worked in premises leased from C.N., where they loaded the freight collected by their employer into freight cars provided by C.N. Cannet made all the arrangements with the customers and C.N., and arranged for unloading and delivery of the freight when it reached its destination on the railway line. The Federal Court of Appeal did not agree with the submission that Cannet’s employees were, in these circumstances, employed “on or in connection with the operation of an interprovincial railway”, so as to bring them within the ambit of the Canada Labour Code:

In my view, whether or not employees whose work is physically upon or in connection with a railway may be said to be employed “upon or in connection with” the railway within s. 108 read with s. 2 of the *Canada Labour Code* must be determined, keeping in mind the constitutional limitations on Parliament’s powers in the labour field, having regard to the circumstances in which the work takes place. Clearly a person employed by the railway company to carry out a part of the transportation services provided to its customers falls within those words even though he does not physically come in touch with the right of way or rolling stock. Just as clearly, a person working for a local businessman in a Province does not fall within those words even though his work, in connection with that man’s purely local operation, requires that he perform a large part or all of his services physically on the railway’s right of way or rolling stock.

For example, if the railway has pick-up service in a city as a part of its overall transportation service, I should have thought that the employees concerned would be regarded as employed in connection with the railway. If, on the other hand, the railway merely supplies railway cars to its customers to be loaded by them and unloaded by consignees, I should have thought that the employees of the consignor, while loading the car for their employer, would continue, from a constitutional point of view, to be working upon or in connection with their employer’s business and would not *pro tem* become railway workers.

When the problem in this case is so approached, in my view, it is clear that the employees in question were not employed upon or in connection with the Canadian National Railway. They were employees of the applicant loading freight on a railway car under arrangements whereby the car was to be loaded by the shipper and not by railway employees.

The Court also rejected the argument that the freight forwarding business was itself an undertaking extending beyond the limits of a province or connecting one province with another:

... In my view, the only interprovincial undertaking involved here is the Canadian National interprovincial railway. Clearly, a shipper on that railway from one Province to another does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking. If that is so, as it seems to me, the mere fact that a person makes a business of collecting freight in a Province for the purpose of shipping it in volume outside the Province by public carrier, does not make such a person the operator of an interprovincial undertaking.

32. Cannet was a subsidiary of the freight forwarding company whose activities were in question in *Re The Queen and Cottrell Forwarding Co. Ltd.*, (1981) 33 O.R. (2d) 486 (Ont. Div. Ct.). There the court considered whether a similar freight forwarding operation was a federal work or undertaking not subject, for that reason, to provincial licencing requirements. The court reviewed the applicable jurisprudence, and particularly the decision of the Federal Court of Appeal in *Cannet Freight Cartage Ltd. and Teamsters Local 419*, *supra*. At page 491 of the report of its decision, the Court said:

... While the decision of the Federal Court of Appeal is not binding upon this Court it is certainly persuasive. In any event, I agree with the decision with certain amplifications. The railway company is the only body carrying on the interprovincial undertaking and it has the physical works as well. Clearly, if an individual customer of Cottrell wished to ship goods to the west, it could contract with the railway company to ship such goods. The mere fact that by contract Cottrell agrees with that individual customer to enter into the contract with the railway company and become the shipper itself, does not make Cottrell anything other than a shipper. The shipment is merely part of an over-all contract and *a person who has no tangible or physical property under its control to operate an undertaking cannot, by contract, make himself a person carrying on an undertaking within the meaning of s. 92(10)(a) of the British North America Act, 1867*. Cottrell is not carrying on an undertaking or operation but is merely providing a service by contract. To hold otherwise would mean that any travel broker or other person engaged in general commerce could, by contract, provide interprovincial undertakings, even though he had no facilities whatsoever, and thereby claim that he was not subject to provincial jurisdiction. This would be unreasonable interpretation of the section in question.

[emphasis added]

32. We agree with and adopt the propositions as set out in the two above considered cases. We are required to determine, for constitutional purposes, the real and functional nature of the business conducted by the respondent. The respondent must be engaged in that business or undertaking itself, and it cannot through contractual means, in effect “contract itself out of” an otherwise proper provincial jurisdiction. See also *Emery Worldwide*, [1984] OLRB Rep. Oct. 1412 and *Airgo Agency Limited*, [1982] OLRB Rep. Sept. 1233, for further cases in support of this view. With few exceptions, all the services provided outside the Province of Ontario are provided on a contractual basis by persons other than employees of the respondent. Those contractual services, while necessary in order for the respondent to assemble a composite package for sale to the public, cannot cause the respondent to be found to be engaged in a federal undertaking, at least within the functional meaning for constitutional purposes. These services are for the most part neither “connecting” nor “extending” in nature, but in any event, other entities have been contracted to perform them. The business of the respondent is to assemble and sell packaged tours to travel agents and members of the public. It is not itself in the business of conducting those tours, nor of transporting the passengers from one location to another. “Connecting” or “extending” beyond the province, within the meaning of section 92(10)(a) of the *Constitution Act*, is neither one of the purposes of the business nor activity performed by the business. Various services it supplies by contract in order to arrange for the transportation of such passengers and their handling at their desti-

nation points do not mean that the respondent itself is involved in that federal undertaking of “connecting” or “extending”. Rather, through arrangements made entirely from within its Windsor location, the respondent has contracted with other entities for specified services to be provided to its customers.

33. The parties also made reference to the *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. Feb. 272. The respondent in that case essentially conducted the business of operating a taxi company, servicing primarily the City of Windsor but involving on a regular but infrequent basis, trips to and from the City of Windsor. The Board therein held that notwithstanding the small percentage of business involving extra-provincial trips across the border, the respondent’s business was not itself a work or undertaking extending beyond the province. The Board felt that the extra-provincial trips were of such a small percentage and so incidental to the main part of the respondent’s business, carrying passengers and making trips within the Province of Ontario, that it could not be said that the respondent’s business, taken as a whole, was “connecting” in nature. As the Board stated at page 289:

... The Board must, to use the words of the Supreme Court of Canada, look to the nature of the respondent’s operations. It must look at the normal, or habitual, activities of Veteran Taxi viewed as a “going concern” and avoid any distorted conclusion that would flow from giving undue weight and regard to the exceptional factor of the runs to Detroit that amount to two per cent of its business, that is provincial in character.

34. The Board in that case based its decision, in part, on the basis that the extra-provincial trips made by its drivers constituted a relatively small percentage of the total business of the respondent company. We do not agree that the percentage of the respondent’s activity involving “extra-provincial” activity is either a critical or determinative factor.

35. The Ontario Court of Appeal dealt specifically with this issue in *Ottawa-Carleton Regional Transit Commission v. Amalgamated Transit Union, Local 279 et al.*, (1983) 84 CLLC 12,025. In that case the Court was asked to consider the nature of the transit system operated by O.C. Transpo in the Ottawa-Carleton region. Although the great majority of routes provided by O.C. Transpo were entirely within the Province of Ontario, it did have regular routes crossing into Hull, Quebec. The Court stated, at page 12,029 et seq.:

The crucial issue to be determined is whether this undertaking connects Ontario with any other province or extends beyond the provincial limits of Ontario in such a way as to fall within the section. Although it may comprise a small percentage of its total operation, it is clear that OC Transpo, on a regularly scheduled basis, connects Ontario with Quebec and, similarly, extends beyond the provincial boundaries in its daily operations. It must therefore be determined if that, in itself, is sufficient to bring the operation within the section.

• • •

There is a long history of decisions pertaining to the trucking and transportation industry. These authorities have rejected a quantitative approach which would determine the result based upon a comparison of the extra-provincial business to the business carried on within the province. Instead, the decisions have turned upon a finding that the extra-provincial operation was a continuous and regular one. If the extra-provincial operation was found to be continuous and regular, then the undertaking was determined to be one which connected provinces. There is no reason, in my view, to depart from that line of decisions which has for many years governed the transportation industry. The test used in those authorities is a reasonable one and it can be readily applied.

The appellant relied upon a decision of the Divisional Court, *Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association 1688* (1980), 30 O.R. (2d) 732. In that case the court was considering the operation of a taxi service. The greatest part of the business (98%) was derived

from fares picked up and delivered within the Windsor area. Some one to two per cent of the company's business involved border crossing runs, either by way of taking passengers and mail from Windsor to Detroit, or other points in Michigan, or bringing passengers back from Michigan across the border to Windsor.

The Divisional Court, after a review of the facts, decided that it was required to consider the main or predominant business of the taxi company and to base its decision upon that finding. At pp. 736-7 the following appears:

I find no essential difference between the concept expressed in *Winner* in terms of the "pith and substance" of a commercial undertaking from that expressed in *Montcalm* where the nature of the operation is, as I read that case, to be elicited from the ordinary activity of the undertaking. As I read *Montcalm* it requires that on the facts before us we consider the main or predominant business of the undertaking: what in *Montcalm* is described as its "ordinary" as opposed to its "exceptional" activity. That, in my opinion, satisfies as well the search for the pith and substance of the enterprise.

...

Thus, it was appropriate in that case to use such terms as "habitual and normal" activities to denote "ordinary" activities whereas it would not be so in this case. The transborder crossings of applicant were, I think, unquestionably "habitual and normal" but, in terms of the great bulk of its business, they were certainly "exceptional".

The concept of "ordinary" rather than "exceptional" business applied to the facts before us lead, in my opinion, to only one conclusion. The ordinary business of applicant [sic] is intraprovincial. Its extra-provincial business is exceptional. The figures adopted by the Board were not challenged. The company's intraprovincial trips outnumbered its transborder trips by a ratio of some 60 or 70 to 1.

I believe, the wrong test was applied in that case. A percentage of business test should not govern the determination.

...

... In my view, the quantitative approach should not be adopted. Rather, the determination of the essential issue as to whether the undertaking connects provinces should be based upon the continuity and regularity of the connecting operation or extra provincial business.

...

36. While the percentage of the extra-provincial activity conducted by employees of the respondent is admittedly small, it is also performed on a regular and continuous basis. However, the test is not whether any employees of a particular respondent on a regular and continuous basis perform some of their job duties outside the Province. If that were so, then businesses who have salesmen who regularly, albeit occasionally, travel outside the Province to sell their goods, would be engaged in federal undertakings or businesses. Similarly, businesses might send buyers outside the Province in order to find products to be bought and shipped to Ontario and sold within the stores run by the business within the Province. It would make no sense from a constitutional perspective to hold that such businesses would thereby become subject to federal labour relations regulation. Indeed, it may not matter whether any employee ever leaves the province. What is critical to this inquiry is whether the business, regardless of whether employees are involved in extra-provincial activity on a regular and continuous basis, is of a connecting nature and the purpose of the business is at least in part to connect the province with points outside the province. In the cases referred to above, where businesses were found to be federal works or undertakings, the extra-provincial activity involved performance of the function central to the business and the business was one of "connecting". For example, in *Re Windsor Airline Limousine*, *supra*, the respondent was involved

in the business of carrying passengers, and as such operated its own vehicles in order to transport those passengers beyond provincial borders. Similarly, in the freight forwarding cases, the essential nature of those businesses was to forward freight. The purpose of those companies was to carry passengers or freight from one location to another, including extra-provincial locations. The companies in those cases were not merely carrying on business at more than one location, but were conducting the business of “connecting” or “extending” beyond the province.

37. In *Ottor Freightways Limited*, *supra*, where the Board found that a trucking company was involved in a federal undertaking, it stated as follows:

8. Thus, relying upon *Attorney-General for Ontario et al v Winner et al*, *Winner et al v S.M.T. (Eastern Ltd. et al* [1954] 4 D.L.R. 657 (J.C.P.C.); *Regina v Manitoba Labour Board ex parte Invistus Ltd.* (1968), 65 D.L.R. (2d) 517; *Re Tank Truck Transport Ltd.* (1961), 25 D.L.R. (2d) 161; and *Regina v Cooksville Magistrate's Court, ex parte Liquid Cargo Lines Ltd.* (1965), 46 D.L.R. (2d) 700, we rule that the respondent's business is an undertaking that connects the Province of Ontario with the Province of Quebec and its labour relations is therefore regulated by the Canada Labour Code. In coming to this conclusion we have not focused on what the various trucking licences empower the respondent to do but rather what it actually does; (see *Re Tank Truck Transport Ltd.*, *supra*, p. 667; *Invistus Ltd.*, *supra*, p. 526); and the test of what it does relates to the continuity and regularity of its interprovincial activity and not to the percentage of total volume that activity represents; (see particularly *Re Tank Truck Transport Ltd.*, *supra*, p. 166; *Liquid Cargo Lines Ltd.*, *supra*, p. 703). In other words the primary function of the respondent's business need not have an interprovincial flavour. Rather, to connect Provinces, it need [sic] only engage in interprovincial activity on a “continuous and regular basis” - a phrase that has been applied to one trucking company that hauled only 1.6% of its loads to or from points outside of Ontario (Liquid Cargo) and to another company where the percentage of such total trips amounted to only 6% (Tank Truck)....

In that case, distinguishing it from the instant proceeding, the respondent whose business was found to be federal in nature itself owned the truck, and more importantly, the primary function of its business was freight forwarding, or carrying goods by truck. The purpose of the business was to “connect” or “extend”, and it would not have mattered whether a particular employee travelled outside the province. If all employees worked at one truck terminal located within the province, and never left the province, the business itself would remain one of “connecting” or “extending” and would be subject to federal jurisdiction.

38. Here the respondent cannot say that the primary function or central nature of its business is one of connecting, by (for example) carrying passenger manifests to and from the Detroit airport, or by seeing passengers off at that airport. The respondent acts as courier or performs these services, for its own purposes and benefits. It is not in the business of ferrying documents across the border, nor of carrying mail to and from Detroit for its customers. It is not in the business of performing those connecting services. It would not be realistic, or appropriate in the constitutional sense, to characterise the respondent's business as that of “conducting” international tours. Rather, what the respondent does is to “assemble” package tours and “market and sell” them to its customers, whether such customers are other travel agents or individual passengers. The fact that activities are performed by employees of the respondent outside the province does not assist the Board in assessing whether the respondent is in the business of “connecting”. It indicates only that the business is carried on at more than one location.

39. Again, if it were otherwise, then any activity performed by an employee on any regular or continuous basis, which involved that employee leaving the Province of Ontario in order to perform the activity, would render that particular business the subject of federal labour relations jurisdiction. Indeed, it is arguable that on the same basis a company would be under federal jurisdiction were it to mail letters or documents to locations outside the Province or were it to use the

telephone for long distance calls outside the province. It would thereby be involved in some extra-provincial activity, although the employee would not have to leave the Province in order to perform such activity. Our inquiry must focus on the nature of the respondent's business, in the constitutional sense, and not solely on whether employees travel beyond the Province in order to assist in some manner in the carrying on of that business, nor on whether the business itself is carried on at more than one location. Department stores like Eatons or Simpson's do not become federal in nature simply because they may send buyers around the world in order to look at goods for purchase and resale in their stores. The central nature of their businesses is selling goods, and whether they carry on this business entirely within the province or at several extra-provincial locations does not make the business constitutionally federal. To be so found the business must have as its purpose "connecting" or "extending".

40. In our view the activities of the respondent which do involve employee's travel beyond the bounds of Ontario fall within the same analytical categories. Such activities are indeed regular and continuous, and form part of the respondent's business. Nevertheless, the purpose of the business is not to "connect" or "extend" nor is it in the business of "connecting" or "extending". It is in the business of assembling and selling package tours to customers.

41. Accordingly, we do not find that the business of the respondent is a federal undertaking or work so as to deprive this Board of jurisdiction.

42. This matter is referred to the Registrar for relisting for hearing to deal with the merits of these consolidated proceedings.

0226-86-U United Brotherhood of Carpenters and Joiners of America, Local Union 3054, Complainant, v. Lloyd-Truax Limited Wingham, Respondent

Arbitration - Collective Agreement - Practice and Procedure - Unfair Labour Practice - Foremen performing bargaining unit work - Union arguing violation of s. 50 of the Act - Whether matter proper for Board consideration - Board finding matter to be one of contract application and interpretation classically dealt with by arbitration - Board deferring matter to arbitration

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *F. W. Murray* and *D. Patterson*.

APPEARANCES: *Christopher Bentley, Adam Salvona, Barb Hollman, Willa Harris, Elmer Schultz, Herb Boelke* and *Glenn Miller* for the complainant; *Christopher C. E. Eames, James E. Bowden* and *Gerry Wilhelm* for the respondent.

DECISION OF THE BOARD (orally); July 21, 1986

1. This is a section 89 complaint in which the union alleges that the employer's failure to adhere to the restrictions in the collective agreement on foremen performing bargaining unit work has been so persistent as to amount to a violation of section 50 of the Act, and to make the matter a proper case for consideration by the Board. The employer, on the other hand, argues that the employer has been making every effort to control the conduct of its foremen, and that the issue between the parties is one of contract interpretation for an arbitrator. The respondent accordingly

asks that the Board defer the matter to the arbitration procedure. There are two outstanding grievances dealing with the matter at this time.

2. None of the comments which the Board has to make are intended to in any way minimize or make light of the problems and frustration which the applicant union and its members are apparently experiencing over this issue of bargaining-unit work. The fact is, however, that it is only a single issue in what appears otherwise, from the responses of the parties this morning, to be a long and effective collective-bargaining relationship, and the simple question is, what is the appropriate avenue of the applicant for enforcement or relief?

3. In that regard, we are mindful of the fact that the *Labour Relations Act* itself establishes two broad avenues for enforcing legal rights: one public, where the disputes are those fundamentally arising out of the unfair labour practice sections of the Act itself; and one private, where the disputes are essentially “contractual” in nature and flow out of the provisions of the parties’ collective agreement. It is the function of the Board to ensure that a proper line continues to be drawn between these two avenues, bearing in mind, as the Board noted in *Country Place Nursing Home*, [1984] OLRB Rep. Mar. 441, that “the arbitration process is also rooted in the statute”.

4. The question of where this line is to be drawn has been most extensively canvassed in the Board’s decision in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254. There the Board, commenting on the appropriateness of arbitration as the forum for “essentially contractual” disputes, at paragraph 7 summarized the test in general terms as follows:

... where key provisions of the *Labour Relations Act* require important elaboration and application or where the employer’s or trade union’s conduct represent a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction.

5. Following up those comments of the Board, we recognize that the kind of repudiation referred to may, in some circumstances, exist even without repudiation of the collective agreement in its entirety. In that regard, we note in particular the case of *Standard Insulation*, [1984] OLRB Rep. Nov. 1622, cited to us by the applicant. But we also note that in that case there *was* no factual issue to be litigated; rather, there was a simple obligation to remit the necessary contributions to the union by the 15th of each month, and the employer, while presumably having it in its power to (at least randomly) comply, simply failed to do so. We also note that in that case the union had in fact *invoked* the final step of arbitration on several occasions, and that the matter in fact was before the Board, in part, with the Board sitting as an arbitrator under the provisions of Section 124 of the Act.

6. In this case there clearly has been no broad repudiation of the collective agreement *or* the bargaining agent, and the issue, in its pristine form, is classically one that arbitrators have been accustomed to dealing with. The relevant provision of this collective agreement provides:

2.02 Persons whose regular jobs are not in the bargaining unit shall not work at any jobs which are included in the bargaining unit...

There then follows, however, a list of exceptions:

... except for the purposes of:

- (i) providing necessary instructions to employees;
- (ii) experimenting with new tools, designs or procedures prior to their adoption for use in regular operations; or

- (iii) in emergencies, or
- (iv) when regular employees are not available.

At some point, the union is going to have to articulate the specific incidents which it is relying upon, so that a third party can decide in which of the particular incidents none of the exceptions provided for in section 2.02 could be said to apply. And the question is, where is that litigation properly to take place? The union, it appears from the face of its allegations, *has* been patient, has, to its credit, attempted to resolve the matter through the acceptance of good-faith undertakings on the part of the employer; but, as it turns out, that has not proven to be successful in controlling the problem, and the one thing the union has *not* done is ever to take the next step *designed* for the ultimate enforcement of these rights under the collective agreement, and that is to proceed with a grievance to arbitration. We are not in any way critical of the union's decision to delay forcing the matter on to litigation. But that delay should not be used now to transform what would clearly be a matter of contract application and interpretation, into something else. In answer to the applicant's remedial concerns, it is not clear to us that an arbitrator will *not* be as flexible in fashioning a remedy, in light of the parties' earlier unsuccessful efforts to resolve this issue, as the Board would be in the present circumstances. It is, in any event, in our view not appropriate, where the factual and legal issues are classically ones for arbitration, to *presume* arbitration will be inadequate, where the Union has not yet taken any steps to test it.

7. It is accordingly our decision to defer this matter to arbitration. We note in that regard the agreement of the employer, given before us, to waive the time limits of the collective agreement relating to the referral of these matters to the final step of arbitration.

8. In light of the history of this matter, and the concerns expressed by the applicant, we are not inclined to depart from our normal practice when deferring, and that is to adjourn the matter *sine die*. See, again, *Country Place Nursing Homes*, *supra*, paragraph 6. The matter will be so adjourned for a period of one year from the date hereof. Should no request to proceed with the matter be received by the Registrar from either party within that period, the proceedings before the Board shall be terminated.

1969-85-R; 2491-85-U Christian Labour Association of Canada, Applicant, v. **Maplehurst Hospital Limited**, Respondent, v. Group of Employees, Objectors; Christian Labour Association of Canada, Complainant, v. **Maplehurst Hospital Limited**, Respondent

Certification - Unfair Labour Practice - Applicant requesting s. 8 certification for full-time bargaining unit after last representation vote - Settlement reached on s. 89 complaint - Board concluding first vote influenced by unfair labour practices - Whether new vote should be ordered or applicant certified outright - Whether true wishes likely to be ascertained in representation vote - Settlement not enough to "restore the atmosphere" - Board exercising discretion to certify pursuant to s. 8

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members F. C. Burnet and H. Kobryn.

APPEARANCES: Elizabeth Forster, Hank Beekhuis and Ed Pypker for the applicant/complainant;

Weir H. Milne, A. T. Griffis and Ursula M. Corcoran for the respondent; David S. Shantz for the objectors.

DECISION OF S. A. TACON, VICE-CHAIRMAN, AND BOARD MEMBER H. KOBRYN; July 31, 1986

1. On agreement of the parties, the above matters were heard together. Board File No. 1969-85-R is an application for certification in which the applicant (CLAC) seeks a certificate pursuant to section 8 of the *Labour Relations Act*. Board File No. 2491-85-U is a complaint filed under section 89 of the Act.
2. The hearing in these matters lasted 8 days; some 14 witnesses testified. The Board has assessed the testimony of the witnesses according to the usual criteria and, having regard to their relative credibility, the documentary evidence and what is reasonably probable in the circumstances, the Board makes the following findings of fact. It is appropriate to note at this juncture that, before the conclusion of the hearing, the parties reached a settlement with respect to the section 89 complaint. That settlement is set out *infra*. In the circumstances, then, the Board does not regard it as necessary to set out its factual findings and analysis in elaborate detail. Rather, the facts are briefly sketched.
3. The respondent operates a chronic care hospital. The owner is one B. Griffis, although by Fall 1985, his son, A. Griffis, assumed greater responsibility in managing the operations. U. Corcoran is the hospital administrator responsible for day-to-day management; L. Cechini is the director of nursing. The hospital employs registered nurses and a support staff primarily consisting of health care aides.
4. In September, 1985, B. Griffis called a staff meeting to review various concerns about staff performance and to affirm Cechini's responsibilities as director of nursing, as she had just recently been appointed to that post from the nursing staff.
5. In November 1985, CLAC applied for certification for an "all employees" unit, including a request for certification pursuant to section 8 of the Act. On December 2, 1985, the "part-time" bargaining unit of aides was certified and a representation vote amongst the "full-time" unit was ordered by the Board, differently constituted. The section 8 certification request was withdrawn on agreement of the parties dated November 22, 1985. On November 25, 1985, CLAC reapplied for certification for a separate bargaining unit of the nurses and was certified on December 24, with a membership count of five of six employees. Several other relevant events in late 1985 should be noted here as well. On December 6, notice to bargain was given in respect of the part-time bargaining units. On December 20, CLAC agreed that the company could create a new supervisory position which might include some of the supervisory functions then performed by the registered nurses. It should be added that the Board decision of December 24 (Board File No. 2166-85-R) certifying the registered nurses noted, for purposes of clarity, that the registered nurses were not "supervisors", the first line of managerial exclusions.
6. It is an understatement to comment that the respondent did not regard these events with equanimity. While it is not uncommon for an employer to feel "betrayed" when his or her employees seek certification, B. Griffis and A. Griffis went farther than an emotional response to actual improper conduct to dissuade their employees from exercising their rights to join a trade union and participate in its lawful activities. Some acts likely seem rather trivial in retrospect, e.g., the annual staff Christmas party was cancelled, then reinstated; the turkeys which were traditionally given to the staff were smaller. Other conduct, though, had a significant impact on the employ-

ees. Specifically, A. Griffis took over the staff scheduling and, as a result, some employees received significantly more or fewer hours, shifts were altered, etc. A. Griffis also decided to proceed with his "planned" re-organization to replace the registered nurses with "supervisors". CLAC indicated it had no difficulty with the respondent hiring supervisors outside the registered nurses' bargaining unit provided those persons performed managerial duties and not the functions of bargaining unit members (see paragraph 5 above). A notice was posted in December 1985 regarding the new supervisory positions and ads placed in local papers. Then, effective January 9, 1986, by letter dated January 7, all six nurses in the bargaining unit were "permanently laid-off" and supervisors hired, at first through an agency and then as full-time employees. Two of the supervisors were from the "laid-off" registered nurses' bargaining unit, P. Culhane and C. McGilvray. Moreover, while the supervisors do perform a few "administrative" tasks of a minor nature, it is clear they actually have "replaced" the registered nurses in that these persons have taken over the latter's regular duties. It should be added that notice to bargain with respect to the "emptied" registered nurses' bargaining unit was given on January 9, 1986.

7. That the respondent has contravened the Act is implicit, albeit not explicit, in the aforementioned settlement; see, for example, subparagraph (e) as set out below. Moreover, on the totality of the evidence the Board has no hesitation in finding that the respondent has violated a number of provisions of the Act. Quite simply, the various explanations offered by A. Griffis to justify the schedule changes, the hiring of supervisors and termination of the registered nurses were contradictory and entirely implausible. The Board was impressed with the witnesses called by CLAC; A. Griffis, however, cannot at all be regarded as credible. The schedule changes constitute a violation of section 79 of the Act, the statutory freeze provision, as does the termination of the entire registered nurses' bargaining unit: see *Simpsons Limited*, [1985] OLRB Rep. Apr. 594 and the cases cited therein, particularly, *Rest Haven Nursing Home*, [1979] OLRB Rep. June 554. Moreover, the Board is satisfied the reasons for these acts were tainted by anti-union animus and, thus, constitute contraventions of section 64, 66 and 70: *Barrie Examiner*, [1975] OLRB Rep. Oct. 745.

8. It is now appropriate to set out the terms of the parties' settlement:

- (a) The parties agree to the reinstatement of the registered nurses to perform those duties performed prior to their dismissal as of January 9, 1986;
- (b) the respondent agrees to compensate the registered nurses in respect of all lost wages and benefits, less monies received by way of mitigation, plus interest on those losses;
- (c) the respondent agrees to return to the schedule in place for employees at the point the "statutory freeze" came into effect;
- (d) the respondent agrees to compensate employees, in respect of the hours lost through those schedule changes implemented during the statutory freeze, for their wages and benefits which would have otherwise been earned, less monies received by way of mitigation, plus interest on those losses;
- (e) the respondent agrees to cease and desist from further violations of the *Labour Relations Act*;
- (f) the respondent agrees to the posting of a public apology, utilizing the format in *Comstock Funeral Homes Ltd.*, [1981] OLRB Rep. Dec. 1755, outlining the resolution of the section 89 complaints and assuring employees that the respondent will respect their rights;
- (g) the parties agree to seek to resolve amongst themselves, the monies owing the various

employees but that, if the question of compensation is not resolved by June 20, 1986, either party is free to request the Board's assistance in resolving that matter.

9. The parties disagreed as to the precise nature of the positions to which the registered nurses were to be reinstated. In this regard, the Board gave the following oral ruling:

The Board has considered the submissions of the parties. In the Board's view, both by virtue of section 89 of the Act which gives authority to the Board to "make whole" persons who are dealt with contrary to the Act and by virtue of section 79 which "freezes" terms and conditions of employment, rights, duties and privileges for a specified period, the Board directs that the registered nurses be reinstated to their positions held prior to January 9, 1986 and, specifically, to perform those duties, obligations and responsibilities associated with those positions.

The above oral ruling is hereby confirmed and, by way of clarification, the Board notes that this ruling applies to all six registered nurses terminated as of January 9, 1986, if they so wish.

10. In view of the Board's disposition of the section 8 certification request, the Board does not consider it useful or necessary to deal further with what may be regarded as more minor allegations by CLAC of impropriety, such as, comments during hiring interviews, etc. The Board next turns to that section 8 issue.

11. In brief, certification pursuant to section 8 has three prerequisites: contravention of the Act; contravention such that the true wishes of employees are not likely to be ascertained in a representation vote; membership support in the applicant adequate for the purposes of collective bargaining.

12. Submissions from counsel for the respondent and counsel for the employee objectors were primary focused on the second element, namely, whether the true wishes of the employees would likely be ascertained in a representation vote. Specifically, the respondent did not assert the first and third elements were absent.

13. It is appropriate at this point to sketch some further background with respect to the section 8 application. As noted earlier, the applicant had originally requested certification pursuant to section 8 of the Act; that request was withdrawn on November 22, 1985. Also as noted, a representation vote was directed in respect of the full-time bargaining unit as described in the decision of the Board (differently constituted) of December 2, 1985. On January 10, 1986, the applicant again filed a request for certification pursuant to section 8 and requested that the representation vote which had been directed not be held. In fact, the representation vote was held on January 13, 1986; the applicant lost the vote nine to seven.

14. In the circumstances, the Board need not dwell at length on the first element, i.e., whether the employer has contravened the Act. The Board has already found violations of the statutory freeze and of sections 64, 66 and 70. Further, the Board finds that the respondent violated sections 64 and 70 of the Act in circulating two letters to employees on December 2, 1985 and January 8, 1986, the latter just prior to the representation vote. An employer need not remain neutral on the subject of unionization but must not use his or her economic dominance to threaten job security or dissuade its employees from seeking representation by a union by disparaging that organization through false and derogatory comments which go beyond what may be termed "election propaganda" tolerated by the Board: see *Dylex Limited*, [1977] OLRB Rep. June 357, upheld 77 CLLC 14,112 (Ont. Div. Ct.); *Viceroy Construction Co. Ltd.*, [1977] OLRB Rep. Sept. 562;

Globe and Mail, [1982] OLRB Rep. Feb. 189; and, particularly with reference to "election propaganda", *McMaster University*, [1979] OLRB Rep. July 685; *Irwin Toy Ltd.*, [1983] OLRB Rep. July 1064. In the Board's view, the contents of these two letters exceeded the bounds of free speech and constituted clear, albeit implicit, threats to job security and terms and conditions of employment and misrepresentations about the applicant. In the instant case, the Board has no hesitation in concluding the first criterion for certification pursuant to section 8 is satisfied.

15. The Board, as well, has no hesitation in concluding the third element is also fulfilled, namely, that, should certification pursuant to section 8 be directed, the applicant enjoys the support of employees in the bargaining unit sufficient for the purposes of collective bargaining. In this regard, the Board notes that the applicant had originally filed membership cards in respect of eight of the seventeen employees in the bargaining unit and, indeed, the representation vote was lost by nine votes to seven.

16. The more difficult matter is the assessment of whether the true wishes of the employees are likely to be ascertained in a representation vote. An unusual feature of the instant case is that a representation vote has already been held. It is apparent that CLAC was apparently able to maintain its initial level of support, i.e., membership cards for eight of seventeen employees and a count of seven of the sixteen voting employees supported the applicant. What the Board must determine is whether the January 13 vote should be set aside as improperly influenced by the employer's unfair labour practices and, secondly, whether a new vote should be directed or whether the applicant should be certified under section 8. Board Member Burnet, in dissent, agreed that the January 13 vote should be set aside but concluded that, once the unfair labour practices had been remedied, a representation vote could be conducted which would ascertain the true wishes of the employees.

17. The majority agrees that the assessment of the representational wishes of the employees is to some extent speculative. Obviously, the Board cannot "read the minds" of those employees to conclusively determine whether those persons could exercise their franchise without being intimidated or improperly influenced by their employer. However, the statute does not prescribe so rigorous a standard; rather, the test is whether the true wishes "are not likely to be ascertained". It is for this reason that the Board requires substantial employer misconduct to justify the extraordinary remedy of certification pursuant to section 8: *Radio Shack*, [1979] OLRB Rep. Mar. 248, upheld 79 CLLC 14,216 (Ont. Div. Ct.); *Ex-Cello Wildex, Canada*, [1977] OLRB Rep. June 370; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *Benwind Industries*, [1985] OLRB Rep. Feb. 149. However, the Board does look to the cumulative impact of the employer's illegal activities: *K Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60; *Robin Hood Multi-Foods Inc.*, [1981] OLRB Rep. July 972; *Benwind Industries, supra*.

18. In the instant case, the employer's misconduct was substantial and comprised several dramatic actions, including, schedule changes, letters to employees and, virtually on the eve of the vote, the termination of all the members of the registered nurses' bargaining unit and their replacement by "supervisors" who, nonetheless, essentially performed the same functions. It is true that the applicant apparently retained its initial level of support notwithstanding the unfair labour practices and that, by virtue of the parties' agreement in this decision, those unfair labour practices will have been remedied at least to a significant degree. Nonetheless, in the Board's view, these remedies will not "restore the atmosphere" to the point where the union could properly conduct its campaign. The Board considers that the unfair labour practices are sufficient, not simply to interfere with the free expression of the true wishes of the employees in the January 13th vote, but the impact of that misconduct will linger so as to render it "not likely" that the true wishes of the employees would be ascertained should another representation vote be directed. Thus, the Board

regards this element to be satisfied as well and exercises its discretion to certify the applicant pursuant to section 8 of the Act in respect of the “full-time” bargaining unit.

19. The Board also notes in passing that, during the course of the hearing, counsel for the respondent and for the employee objectors, characterized conduct by the applicant during its organizing campaign and prior to the representation vote as improper. No formal allegations of unfair labour practices were filed in this regard but counsel for the employee objectors, in particular, noted such conduct with respect to whether the Board should exercise its discretion under section 8 of the Act. It is apparent to the Board on the evidence heard touching on this impugned conduct that the actions of the applicant were in no way improper. The employees were not intimidated or harassed by the applicant; the union organizer, E. Pypker, was, indeed, courteous in his contacts with employees, including those not supporting the applicant.

20. In summary, then, the Board:

- (a) finds the respondent violated section 64, 66 and 70 of the Act in implementing the schedule changes in late December 1985 and into 1986, in terminating the registered nurses and in replacing them with “supervisors” (as noted, the Board need not elaborate on other, more minor conduct, which also violated the Act, e.g., cancelling the Christmas party);
- (b) finds the conduct referred to in (a) also constitutes a violation of section 79;
- (c) having regard to the agreement of the parties, directs:
 - (i) the respondent to reinstate all six registered nurses, if they so wish, to their positions, i.e., to those duties, obligations and responsibilities associated with those positions, held prior to their termination as of January 9, 1986;
 - (ii) the respondent to compensate the registered nurses in respect of all lost wages and benefits, less any monies received by way of mitigation, and to pay interest on those losses calculated according to the Board’s usual practice, as set out in Practice Note 13;
 - (iii) the respondent to restore the schedule in place at the point the statutory freeze came into effect;
 - (iv) the respondent to compensate employees, in respect of hours lost through those schedule changes implemented during the statutory freeze, for the wages and benefits which would otherwise have been earned, less any monies received by way of mitigation, and to pay interest on those losses calculated according to the Board’s usual practice, as set out in Practice Note 13;
 - (v) the respondent to cease and desist from further violations of the *Labour Relations Act*;
 - (vi) post copies of the attached notice, marked “Appendix”, after being duly signed by A. Griffis or B. Griffis, in conspicuous places where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days; reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material; reasonable physical access to the premises shall be given by the respondent to a

representative of the applicant so that the applicant can satisfy itself that this posting requirement is being complied with;

- (d) certifies the applicant, exercising its discretion under section 8 of the Act, in respect of the following bargaining unit:
all employees of the respondent at Thorold, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, office and clerical staff and persons regularly employed for not more than twenty-four (24) hours per week. [Bargaining unit #1 in the decision of the Board (differently constituted) dated December 2, 1985]

DECISION OF BOARD MEMBER F. C. BURNET;

1. The conditions precedent to the application of section 8 are (1) the contravention of the Act by an employer, (2) such that in the judgment of the Board, the true wishes of the employees are not likely to be ascertained, and (3) that the union has adequate membership support for the purpose of collective bargaining.
 2. Conditions (1) and (3) are not at issue. Whether the employer's contraventions have created a situation in which "the true wishes of the employees ... are not likely to be ascertained" is the basis of my dissent.
 3. The responsibility placed on the Board of reading the minds of a group of employees as to their representational desires and as to the degree to which they may or may not have been improperly influenced or intimidated, and the degree to which such intimidation may or may not have followed them into the privacy of the ballot place, is obviously fraught with risk and difficulty. Being an imprecise judgemental exercise, and one which supercedes the recognized procedures of the secret ballot, it should only be invoked when there is no alternative. The purpose is neither to punish a recalcitrant employer nor to compensate a rejected union, but to protect the rights of employees to representation of their own choice.
 4. In the instant case, the staff at the hospital, numbering about 32, are a mix of professional, semi-professional and trades persons of apparently average education. About half of them appeared as witnesses and demonstrated the generally amicable personal relationships in a small organization, even between contending witnesses and different authority levels. While I do not totally dismiss the possibility that some may have been influenced by the employer's contraventions, their demeanour and evidence did not suggest that they would be readily susceptible or vulnerable to such influences. Moreover, during the course of the hearings covering a separate but associated issue, the parties agreed upon the reinstatement with full compensation of 6 nurses who had been improperly discharged from a different bargaining unit than the one here at issue, plus compensation for persons within this unit and others who may have lost time through improper scheduling. The monetary amounts are substantial, and this settlement provides clearest evidence to employees that legitimate exercise of their rights under the Act is effectively protected. Under these particular circumstances, I do not think the "true wishes of employees are not likely to be ascertained" by a supervised, secret ballot. I would accordingly set aside the vote of January 13 by which the union application was defeated and order a new vote.
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Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAYOFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL REINSTATE ALL SIX REGISTERED NURSES, IF THEY SO WISH, TO THEIR POSITION PRIOR TO THEIR TERMINATION AS OF JANUARY 9, 1986 AND COMPENSATE THOSE PERSONS FOR ALL LOST WAGES AND BENEFITS, LESS MONIES RECEIVED BY WAY OF MITIGATION, PLUS INTEREST.

WE WILL RESTORE THE SCHEDULE IN PLACE AT THE POINT THE STATUTORY FREEZE CAME INTO EFFECT AND COMPENSATE EMPLOYEES FOR ALL WAGES AND BENEFITS LOST AS A RESULT OF SCHEDULE CHANGES IMPLEMENTED DURING THE FREEZE, LESS MONIES RECEIVED BY WAY OF MITIGATION, PLUS INTEREST.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

MAPLEHURST HOSPITAL LIMITED

PER: _____
(AUTHORISED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0064-86-U International Woodworkers of America, Complainant, v. Marks Lumber Ltd., Respondent

Adjournment - Practice and Procedure - Unfair Labour Practice - Complaint relating to bargaining between employer and union - Employees only incidentally affected - Employees not entitled to notice - Request for adjournment to facilitate notice refused

BEFORE: Judge R. S. Abella, Chairman, and Board Members W. G. Donnelly and C. Ballentine.

APPEARANCES: David I. Bloom, Roman Stoykewych, William Pointon for the complainant; A. P. Tarasuk, F. Marks for the respondent.

DECISION OF THE BOARD; July 7, 1986

1. This complaint alleges a violation of the respondent of sections 3, 15, 64, 66, 67, and 70 of the *Labour Relations Act*. Included in the relief claimed by the applicant are the following remedial requests:

Schedule "A"

4. A direction that the respondent return to the bargaining table and remove its proposal for preferential seniority for those employees who never went on strike or who abandoned the strike.

5. An order that the respondent maintain the method of operation and staffing levels in place prior to the strike for the duration of any collective agreement, which is ultimately reached or if no agreement is reached, for a period of two years from the commencement of the strike.

and in the alternative

6. An order directing that any of all layoffs be on the basis of seniority and that employees terminated due to lack of work be paid severance pay of one week per year of service.

2. The application was filed on April 7, 1986 and the hearing was scheduled for June 10, 1986. On June 4, 1986, A.P. Tarasuk, on behalf of the respondent, wrote to the Registrar stating, among other things, "... it is the Respondent's position that the relief claimed in paragraphs 4, 5 and 6 of Schedule "A" could affect the rights of employees who returned to work prior to this date. In our respectful submission, all such employees should be served notice of the hearing and given the opportunity to appear on their own behalf." On June 6, 1986, 4 days before the scheduled hearing date, the Registrar received the names and addresses of 25 employees who are continuing to work during a lawful strike which commenced on March 11, 1986.

3. At the commencement of the hearing, Tarasuk requested an adjournment so that the 25 employees referred to in the letter received by the Board on June 6 could be served with notice of the proceedings. The applicant union opposed the adjournment. After hearing argument, the Board denied the respondent's request.

4. The Board's previous jurisprudence has been to refuse to give notice or party standing in circumstances such as these. (See *Timothy W. Smith and William Morton v. Toronto Joint Board Amalgamated Clothing and Textile Workers Union, Local 1414J v. Group of Employees* [1984] OLRB Rep. Aug. 1133; *International Chemical Workers, Local 159 v. Kodak Canada Ltd.* [1977] OLRB Rep. Aug. 517; and *Ontario Sheet Metal Workers Conference v. Ontario Hydro* [1986] OLRB Rep. May 663). The facts in this case are distinguishable from those in *Re Hoogendoorn*

and *Greening Metal Products & Screening Equipment Co. et al* (1968), 65 D.L.R. (2d) 641 (S.C.C.) and in *Re Bradley et al and Ottawa Professional Firefighters Association et al* (1967), 63 D.L.R. (2d) 376 (Ont. C.A.). In both of those cases, the employees were held to have a sufficiently direct interest to be entitled to status as parties. In the circumstances of this case, we find the interests of the 25 employees to be incidental to the main issues before us and no more directly affected than those of other employees whose working relationship may to some extent be affected by remedial orders in unfair labour practice disputes. The essential dispute in this case is one of bargaining between an employer and a union certified to represent the interests of bargaining unit employees. It would not be appropriate routinely to grant notice in section 89 complaints to all employees whose interests are incidentally or potentially affected by the outcome since neither their rights nor conduct are centrally in issue in the proceedings.

5. For all of the above reasons, the respondent's request for an adjournment is denied.

0836-86-FC United Brotherhood of Carpenters and Joiners of America, Local Union 1030, Applicant, v. Nepean Roof Truss Limited, Respondent

Duty to Bargain in Good Faith - First Contract Arbitration - Parties able to agree on most substantive provisions - Union making substantial economic concessions - Analysis of s. 40a(2) - Whether employer's insistence on three year term for contract and refusal to recognize seniority rights without reasonable justification - Board directing settlement of first collective agreement by arbitration

BEFORE: Judge R.S. Abella, Chairman and Board Members I. Stamp and P. Grasso.

APPEARANCES: Frank Manoni for the applicant; Russell Zinn, Claude Ouellette and Hubert Steenbakkens for the respondent.

DECISION OF THE BOARD; July 24, 1986

1. This is an application for a direction that a first collective agreement be settled by arbitration pursuant to section 40a of the *Labour Relations Act*. The respondent called no evidence.

2. The Board certified the applicant union as bargaining agent for a group of 14 of the respondent's employees on November 5, 1984. Two petitions opposing the certification were also before the Board panel hearing the certification. On October 9, a day before the posting of the application for certification, 4 employees were laid off, all of whom were union members. Two of these employees had more seniority than the originator of one of the petitions. This latter petition, filed on October 12, was rejected by the Board which concluded "... it is more likely or probable that the employees who signed the petition did so in order to avoid a reaction from the respondent for supporting the union rather than to voluntarily express opposition to the union". The second petition, filed on October 15, was rejected since there was no evidence presented concerning its origination or circulation. (*Nepean Roof Truss Limited*, File No. 1629-84-R. Unreported).

3. On October 9, 1984, the union filed a complaint with the Board alleging violations of sections 64, 66 and 70 of the Act arising out of the termination without notice of the 4 union members. (File No. 1864-84-U). The employees were Gilles Berthiaume, Elie Belok, Peter Simmons

and Paul Simmons. On November 6, 1984, the union filed an additional complaint alleging violations of sections 64, 66 and 70 arising out of the termination of union member Clinton Perron (File No. 2146-84-U). In a consolidated hearing on April 22 and 23, 1985, the Board sustained the first complaint and ordered that the employees be reinstated forthwith. Despite attempts to settle the issue of compensation, as of July 16, 1986, the hearing date of this application, the parties have been unable to resolve this matter. The complaint dealing with Clinton Perron was dismissed.

4. The first bargaining session between the parties took place on November 21, 1984. The union's initial bargaining proposal was that Nepean Roof Truss Limited be subject to the same terms and conditions as those contained in a collective agreement between the Local and Capital Roof Truss. Frank Manoni, the union negotiator for the Local, was of the view that since he understood that Hubert Steenbakkers was a principal in both companies, since both companies were involved in the same kind of work, and since Steenbakkers negotiated on behalf of both companies, the contracts should be similar. The union also proposed a pay increase of \$2.00 per hour.

5. The company's position in this first bargaining session was that it was inappropriate to have similar contracts, that the contract was not working out at Capital Roof Truss, and that the wages of the employees at Nepean should be reduced by 50¢ per hour. The company also rejected a "job security" or seniority rights clause, and proposed that the union steward be jointly selected by the union and the company. This latter proposal was subsequently dropped by the company.

6. The union's response was to apply for conciliation on November 26, 1984. On November 28, 1984 it filed a complaint with the Board alleging violations of sections 79 and 15 based on the company's proposal to reduce wages and on its implementation 3 days later of this reduction (File No. 2413-84-U). These complaints have since been dismissed by another panel of the Board but reasons for their dismissal have not yet been issued.

7. The parties met with the conciliation officer on January 3, July 16 and October 3, 1985. In addition, the parties met and exchanged proposals on May 6, August 20 and September 20, 1985. As a result of the conciliation meetings, the union was prepared to modify substantially its proposals and accept the current wages, provided the term of the contract was for 1 year and provided there was "job security" at least for the 3 remaining union members in the bargaining unit. The company refused to grant "job security", increased wages, or benefits. A "no board" report was issued on October 11, 1985.

8. On May 27, 1985, the union filed another complaint alleging violations of sections 15 and 79 based on the company granting an increase of wages to the majority of the employees in the bargaining unit. This matter was heard by the Board on November 5, 6 and 7, 1985. At the instigation of the chairman of that panel, the parties again exchanged proposals. These discussions proved unsuccessful, but in the course of the hearings, Manoni gave evidence that if the company would agree to the minimum seniority protection for Paul and Peter Simmons and to a one year term, he would agree to the company's proposed agreement. This agreement provided for no increase in wages or benefits. The company refused. The union's complaint was dismissed by that panel of the Board on July 14, 1986. Reasons are not yet available.

9. On December 13, 1985, an application was made to terminate the union's bargaining rights (File No. 2450-85-R). The application was heard by yet another panel of the Board on March 6, 1986 and was dismissed on July 11, 1986, with reasons to follow at a later date.

10. Manoni's position was that he wanted "job security" or seniority rights at least for the union members who had been previously fired because the company had made it clear that they would not accept a seniority provision in lay-offs, terminations or promotions as a general principle

for all employees. During the May 6 meeting, the company argued strongly that they wanted to hire and fire whomever they wished. Claude Ouellette, on behalf of the company, told Manoni that if he could find someone who could work for \$5.00 per hour and do the same work as someone now getting \$8.00 or \$10.00 per hour, he wanted to be able to lay-off the \$8.00 per hour employee and hire someone for \$5.00 per hour. Because the Simmons brothers were earning these higher wages and because they had already been terminated for union activity, Manoni said he was anxious to protect their seniority rights. Moreover, Manoni testified that the status quo in the company prior to the union's certification had been to conduct lay-offs in accordance with seniority. What he said he was therefore seeking to include in the collective agreement was merely a preservation of the status quo.

11. After the meeting with the conciliation officer on July 16, 1985, Manoni requested a written proposal from the company. The company's written proposal was given to the union on September 20, 1985. Rather than a "job security" or seniority rights clause, the company suggested a "merit provision". The merit clause proposed by the company stated:

ARTICLE 11

MERIT

11.01 The Company and the Union agree that in all cases involving vacancies, promotions, transfers, layoffs, recalls, terminations, wages and vacation scheduling, employees shall be considered on the basis of merit, including among other things, their skill, ability, qualifications, job duties, performance, record, potential and experience. The Company shall determine the relative merit as between employees in a given case and take action accordingly. In the case where two or more employees are determined by the Company to be of equal merit, the Company shall take action in accordance with the length of service of the employees.

11.02 Each new employee shall successfully complete a period of probation of ninety days.

11.03 The Company shall lay off employees in accordance with the requirements of the *Employment Standards Act*.

In addition, the company proposed that the term of the agreement be for a period of 3 years.

12. The union's counter-proposal stated in part:

As a sign of good faith, the Union will accept any of the present employees as members with minimum initiation fee of one (\$1.00) Dollar and the Company will lay-off, call back, promote, transfer with preference by order of seniority of service within the bargaining unit Paul Simmons and Peter Simmons notwithstanding their participation to the proceedings of said certification. (*Note: If the Company wishes, may delete "Paul Simmons and Peter Simmons" above and replace it with "any employee".*)

[emphasis added]

It also proposed a one year term.

13. In replying to this counter-proposal as to seniority, the company agreed in writing "not to discriminate against Peter Simmons or Paul Simmons because of their union activity". The union rejected this on the grounds that it gave the union no more than was already protected by the provisions of the *Labour Relations Act*. In turn, it proposed that "the company shall maintain the status quo established prior to October, 1984 in relation to the laying off and re-hiring of Paul Simmons and Peter Simmons". The company refused on the grounds that offering protective

seniority rights only to some employees would discriminate against other members of the bargaining unit. It gave no reason for refusing to offer this protection to all employees.

14. Since the time when discussions were conducted during the bad faith bargaining and freeze violation hearings before the Board on November 5, 6 and 7, 1985, there have been no further negotiations. Manoni stated that he felt there was nothing further he could do but await what he hoped would be a finding from the Board that the company had bargained in bad faith and a direction to the company to return to the bargaining table. In his view, there was no point in attempting further negotiations pending the Board's ruling since the company had taken a firm stand on the two outstanding issues - the term of the agreement and what Manoni referred to as "job security" or protective seniority. By the time negotiations had broken off in November, 1985, the parties had been able to agree on most substantive provisions. The union had made substantial economic concessions to the company on terms less favourable than those found in the Capital Roof Truss collective agreement.

15. Section 40a of the *Labour Relations Act* introduces a unique facilitative tool into the traditional bargaining process in Ontario. In its central provisions, it states:

s.40a (1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

(a) the refusal of the *employer* to recognize the bargaining authority of the trade union;

(b) the uncompromising nature of any bargaining position adopted by the *respondent* without reasonable justification;

(c) the failure of the *respondent* to make reasonable or expeditious efforts to conclude a collective agreement; or

(d) any other reason the Board considers relevant. (emphasis added)

16. It is clear from these provisions that the legislature has acknowledged the significance to the collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it recognizes that the negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section 40a does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one. What it provides is access to this remedy where certain conditions precedent have been met. These conditions are enumerated in subsections (a) - (d) of section 40a(2).

17. To understand the conceptual underpinnings of the legislation, it is useful to dissect the language of section 40a(2). The Board is directed to impose settlement of a first collective agree-

ment by arbitration where “it appears ... that the process of collective bargaining has been unsuccessful because of ...”. The Board is thereby obliged to consider the following factors:

i) “The *process* of collective bargaining”. The use of the word ‘process’ imports into the deliberation an examination of the interaction between the two parties. It is a truism that the negotiation of any contract involves a considerable range of bargaining positions and tactics. It is a dynamic exchange, with each party relying as extensively as possible on those postures most likely to induce the other side to accept a tolerable result. The Board must therefore be sensitive to this bargaining reality when considering how each party has conducted itself. It is the totality of the process that is under scrutiny, and the Board must be cautious not to examine the complaint in a factual vacuum. The conduct of both parties is therefore relevant, not only for understanding why the process has been unsuccessful, but also for assessing whether it has been unsuccessful for any of the enumerated reasons. This does not intend to suggest that the applicant’s conduct will be a bar to the imposed settlement of a first contract, but rather that its conduct is relevant in assessing the reason for the failure of the process.

ii) “The process ... has been unsuccessful *because of...*”. This language makes it clear that section 40a contemplates a cause-and-effect oriented assessment. Unless the applicant can demonstrate that the reason for the unsuccessful process is the employer’s refusal to recognize the union’s bargaining authority, the respondent’s unreasonably uncompromising bargaining proposals, the respondent’s dilatory or unreasonable efforts to reach an agreement, or any other reason the Board deems relevant, then notwithstanding the failure to conclude an agreement, the Board is not entitled to direct its imposition. In the infancy of this legislation, it has yet to be determined what other reasons the Board may consider relevant within the meaning of section 40a(2)(d), but logic and the spirit of section 40a suggest that this will involve a case-by-case analysis of whether there is a causal connection between the “reason” in question and the failure of the collective bargaining process.

iii) “Irrespective of whether section 15 has been contravened”. Section 15 of the *Labour Relations Act* imposes the duty to “bargain in good faith and make every reasonable effort to make a collective agreement”. The reference to section 15 in this way can only be interpreted as making a distinction between bad faith bargaining and first contract assessments. The Board is not to be bound by whether or not the conduct complained of violates section 15. Given the Board’s jurisprudence pursuant to section 15, wherein the Board has held that hard bargaining is not necessarily bargaining in bad faith (*T. Eaton Company Limited* [1985] OLRB Rep. March 491; *Radio Shack* [1985] OLRB Rep. Dec. 1789), one is left with the inescapable conclusion that the legislature has intended a different standard to apply in the determination of first contract disputes, a standard peculiar to section 40a adjudications. This does not suggest that contravention of section 15 is irrelevant. A contravention of section 15 may well be a factor to consider in assessing why the process was unsuccessful. But the absence of sufficient facts upon which to find a contravention of section 15 does not preclude the application of section 40a. Hard bargaining may not violate section 15, but rigid bargaining

proposals may, if they fall within subsections (a) - (d) of section 40a(2), justify the imposed settlement of a first collective agreement.

18. In the case before us, the applicant asserts that the process of collective bargaining has been unsuccessful because the respondent has violated section 40a(2)(b). The union states that the uncompromising nature of the company's bargaining position with respect to its insistence on a three year term, and its refusal to recognize seniority rights or "job security", was without reasonable justification. This subsection requires that a bargaining position be not only uncompromising, but also that it be adopted without reasonable justification. Moreover, it refers to "any" bargaining position, so that despite the myriad of proposals and counter-proposals exchanged in the course of bargaining, it is conceivable that even a single intractable position, if unreasonably maintained by a respondent during bargaining, may entitle an applicant to access to an imposed settlement if the proposal can be shown to have caused the failure of the process.

19. Identifying an uncompromising bargaining position is not a difficult exercise; determining whether it is reasonably justified poses a greater challenge. A bargaining proposal's reasonable justification must be weighed in the context of the current climate of collective bargaining, the particular bargaining process undergone by the parties, the institutional realities from which it derives, and its intrinsic merit. Subsection 40a(2)(b) recognizes that in collective bargaining, uncompromising positions are frequently taken, and are occasionally effective strategies in eliciting compromise. In the economic and political contest that collective bargaining represents, uncompromising postures are part of a well-understood methodology. But where in the negotiation of a first agreement they are unreasonably maintained, and where the process of bargaining has been sacrificed to their rigidity, the Board is mandatorily instructed by section 40a(2) that it "shall direct the settlement of a first collective agreement by arbitration".

20. The first uncompromising position about which the union complained was the company's insistence on a 3 year term. Although there was no evidence before us on what the exact terms of the collective agreement between Local 1030 and Capital Roof Truss were, Manoni testified that they were more economically advantageous than the substantial concessions he was prepared to accept for Nepean employees in the interests of getting a first agreement. It would have been irresponsible of him, he argues, to accept an inferior proposal for 3 years not only because of the disadvantages to Nepean employees, but also because it placed in jeopardy the interests of the Capital Roof Truss employees whose contract was due to expire during the next year and on whose behalf he would be negotiating a renewal with Steenbakkens. There was no evidence, on the other hand, to justify the reasonableness of the company's insistence on a three year term.

21. In requesting and insisting on seniority rights or "job security" for at least the original union members in the bargaining unit, each of whom had previously experienced unlawful terminations for union activity at the hands of the company, Manoni said he was merely seeking to enforce minimum protection. His counter-proposal makes it clear that he would have been prepared to accept seniority rights for all employees, but in the face of the company's persistent refusal to grant it, felt constrained to settle for a proposal that restricted these rights to previously terminated employees.

22. The company's view that the individualization of seniority rights was unacceptable as unfair to other bargaining unit employees is understandable. There was no justification given, however, for refusing to grant seniority rights or "job security" to all bargaining unit employees. Given that the status quo prior to certification with respect to terminations, lay-offs or promotions had been to acknowledge seniority of service, it is not clear why the company would insist on its omission from the collective agreement. In today's labour relations climate, and given the signifi-

cance to the labour movement of this basic principle, the company ought to have known that the union could not readily accept a broad merit clause in the absence of a seniority rights provision. The protection of seniority rights is such a fundamental part of the scheme of modern collective bargaining outside the construction industry, that the company's refusal to grant it as a general principle, with or without a merit component, could only be interpreted in this case as an unwillingness to engage in a serious attempt to effect an agreement.

23. The company argues that since the union did not conduct a strike vote, the company is therefore entitled to maintain its own firm bargaining positions. A strike vote may bolster the union's resolve and inspire compromise in the company, but where the legislation is silent on the need for such a vote as a condition precedent to imposed first agreements, it is superfluous to inject this mechanism as yet another hurdle in the bargaining process leading to first contracts. In the absence of a statutory caveat restricting the bargaining capacity of a certified union, there is no need to impute an automatic obligation on the part of that union to conduct a strike vote whenever negotiations have broken down in a first contract situation. In a protracted and frustrating series of negotiations preceding first agreements, it may well be that the resulting malaise and dissipated confidence among employees make the taking of a strike vote counter-productive for the union. The union's bargaining authority must be recognized and presumed, and the company is obliged to acknowledge this reality and conduct itself accordingly, whether or not a strike vote has been taken.

24. The company additionally argues that the Board should take into consideration the dismissal of the bad faith bargaining complaints as evidence of the company's good faith. Section 40a(2) directs the Board to analyse first contract bargaining processes "irrespective of whether section 15 has been contravened". As stated in paragraph 17 of this decision, section 15 is specifically distinguished from first contract determinations, making it clear that the test to be applied under section 40a(2) is a different one from that developed in the bad faith bargaining jurisprudence. The company is therefore not entitled to rely on these dismissals as *prima facie* proof that they have not caused the failure of the bargaining process within the meaning of subsections (a) - (d) of section 40a(2).

25. Finally, the company argues that the union has made no serious attempt to reopen bargaining since October or November of 1985. It is difficult to see what further efforts the union could have made in the circumstances. Having been categorically informed by the company that it would not recede either from the 3 year term or the merit clause, both of which were understandably unacceptable, and the union having compromised on almost all other major matters, it is not surprising that it determined that further negotiations would be futile without a finding by the Board that the company had bargained in bad faith and should return to the bargaining table. It is now almost two years since the union was certified, and during that time, the union has made reasonable efforts to conclude an agreement. This does not suggest that a union is absolved from the duty to continue bargaining attempts whenever it has instituted proceedings before the Board under section 89, but where the bargaining realities make such attempts obviously meaningless, it ought not to be penalized for invoking the Board's jurisdiction in this way or for recognizing the futility of the exercise.

26. In all of the circumstances, we are satisfied that the process of collective bargaining has been unsuccessful because of the uncompromising nature of the respondent's bargaining position with respect to the term of the agreement, and particularly with respect to its refusal to accept a seniority rights clause, both without reasonable justification. Therefore, the Board directs the settlement of a first collective agreement by arbitration.

0691-86-R Canadian Brotherhood of Railway, Transport & General Workers, Applicant, v. Northridge Plastics Limited, Respondent

Certification - Practice and Procedure - Representation Vote - Form 9 signed "for" declarant by another individual - Whether acceptable - Proper Form 9 required to be filed at time Board determines membership support - Only appearance of support required to direct pre-hearing vote - Proper Form 9 can be filed after vote

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *R. Wilson*.

DECISION OF THE BOARD; July 8, 1986

1. This is an application for certification in which the applicant has requested that a pre-hearing vote be taken. By order dated June 13, 1986, the Board (differently constituted) authorized a Labour Relations Officer to confer with the parties as to their positions on the description and composition of an appropriate bargaining unit and a voting constituency for the purposes of this application, to examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 9 of the *Labour Relations Act* ("the Act") and to confer with the parties with respect to a voter's list and vote arrangements for the purpose of any vote that might be directed by the Board and to report to the Board. Having now received the report of the Labour Relations Officer on her meeting of June 25, 1986 with representatives of the parties, we must now make the determinations and exercise the discretion contemplated by subsection 9(2) of the Act, which provides:

9(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

2. The applicant has filed 21 combination applications for membership and receipt cards, along with a Form 9 declaration which refers to documentary evidence of membership submitted on behalf of 20 persons. The opening words of the form, as completed by the applicant, read:

I, Dave Tilley, the Representative of the applicant herein, declare that, to the best of my knowledge, information and belief:

The signature line at the foot of the declaration is completed in the following manner:

"Cyril Hoadley"

(signature)

Cyril Hoadley

For: D.A. Tilley, Representative

3. Before any effect will be given to it, a Form 9 declaration must be signed by the declarant named in it. A declaration in the form tendered by the applicant does not satisfy the requirement of Rule 6 of the Board's rules of procedure, which provides:

6. The applicant shall, not later than the second day after the terminal date for the application, file a declaration concerning membership documents in Form 9.

Rule 82(2) empowers the Board to enlarge the time prescribed for filing a Form 9 declaration. In applications other than those in which a pre-hearing vote has been requested, the Board has generally permitted filing of the Form 9 declaration at any time up to and including the hearing of the application: *The Intelligencer*, [1976] OLRB Rep. Mar. 120, *Wiltshire Catering Division of J. V. Wiltshire Ltd.*, [1975] OLRB Rep. Dec. 916; *Westgate Nursing Home Inc.*, [1981] OLRB Rep. Apr. 503. When the application reaches the point at which the Board must determine whether it is “satisfied” that a particular percentage of employees in the appropriate bargaining unit were members of the applicant trade union at a particular time, the Board will not act on membership evidence which is unsupported by a properly completed Form 9 declaration. In an application of this sort, that question arises *after* a pre-hearing representation vote is conducted, as appears from subsection 9(4) of the Act:

- 9(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

4. The question we must address at this stage is not whether we are “satisfied” that the applicant enjoys a particular level of membership support, but only whether it “appears” to us that there is membership support for purposes of subsection 9(2) of the Act sufficient to permit taking the administrative step of conducting a pre-hearing representation vote. The test in subsection 9(2) is whether the requisite appearance emerges from “an examination of the records of the trade union and the records of the employer...” Combination application for membership and receipt cards are “records of the trade union.” Neither the absence of a Form 9 declaration nor the presence of a defective one can diminish either the character of cards as records or the appearance of membership they create. Accordingly, subsection 9(2) does not appear to require that the Board examine or even have before it a Form 9 declaration at the time it determines whether to direct a pre-hearing representation vote. Of course, if no Form 9 declaration is filed or accepted for filing before the Board makes its determination under subsection 9(4), or if the Board then finds that the Form 9 declaration filed by the applicant is unreliable, the application will be dismissed at that point, and that is so even if a majority of votes were cast in favour of the applicant in the pre-hearing representation vote: *W. & H. Voortman Limited*, [1975] OLRB Rep. Aug. 605. Thus, while the Board can and should direct a pre-hearing representation vote in an otherwise appropriate case when a Form 9 declaration has not yet been filed or, if filed, is obviously defective, it would be prudent in such circumstances for the Board to direct that the ballot box be sealed unless and until an apparently proper Form 9 declaration is filed on consent of the parties or with leave of the Board.

5. Accordingly, it appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

6. The Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the respondent in the Municipality of Gosfield North, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, students employed during the school vacation period and persons employed for not more than twenty-four (24) hours per week.

This voting constituency represents the unit of employees of the respondent which the applicant and respondent agree is appropriate for collective bargaining.

7. All employees of the respondent in the voting constituency on the 23rd day of June, 1986 who have not voluntarily terminated their employment and have not been discharged for cause between that date and the date the vote is taken will be eligible to vote.
8. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
9. The ballot box will be sealed and the ballots cast not counted until an apparently proper Form 9 declaration is filed on consent of the parties or with leave of the Board.
10. The matter is referred to the Registrar.

2527-85-M Ontario Allied Construction Trades Council and L.I.U.N.A., Local 597, Applicant, v. The Electrical Power Systems Construction Association and Ontario Hydro-Darlington G.S., Respondent

Arbitration - Construction Industry Grievance - Practice and Procedure - Timeliness - Grievor claiming retroactive room-and-board allowance - Grievance launched with considerable delay - Board applying equitable doctrine of *laches* - Grievance dismissed

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *J. Wilson* and *B. L. Armstrong*.

APPEARANCES: *David Strang*, *W. Fairservice* and *Don Little* for the applicant; *C. C. White*, *Ivar Starasts*, *J. P. Bennett* and *S. Goldsworthy* for the respondent.

DECISION OF THE BOARD; July 3, 1986

1. This is a referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*.
2. The grievor, Bruce Lynch, has been working for Hydro at its Darlington construction project since August of 1982. He lives in Huntsville (which, the material point is, is more than 97 kilometres from the project) and is claiming room-and-board allowance for the period August 4, 1982 to January 16, 1984. Article 19.2 of the collective agreement provides as follows:

ROOM AND BOARD

19.2 The following conditions will apply

REV for employees whose regular residence* is more than 97 radius kilometers from the project:

(a) An Employer may supply either:

- (i) free room and board in camp or a good standard of board and lodging within a reasonable distance of a project; or

- (ii) a subsistence allowance.
- (b) An employee may exercise his option not to stay in a camp or accept free room and board. An employee who exercises this option shall receive a subsistence allowance as follows, subject to 19.2(c) below:
 - (i) When an employee's regular residence is between 97 and 161 radius kilometers from the project, he shall be paid a subsistence allowance of \$28.00 per day for each day worked or reported for and \$10.00 per day for non-work days and Statutory Holidays, ...

3. The grievor at the time of his hiring was first contacted by the union to come in for a referral slip. He then proceeded to the Hydro employment office to complete the necessary papers. On the question of eligibility for employment, the collective agreement provides:

Article 12

EMPLOYMENT

12.1 (a) For purposes of this Article, a geographic area will be established for each Project and geographic areas for each Lines and Stations Zone. The size of these geographic areas will be dependent upon the location of the work and the trade concerned.

(b) The boundaries of the geographic areas will be jointly established at prejob conferences.

12.6 The employment of tradesmen and apprentices, excluding key tradesmen, shall be carried out on the following basis and sequence:

- (a) The EPSCA office will request the appropriate local union office for tradesmen and apprentices required. The request will include a description of the work, the number of tradesmen and apprentices required, and the name of the Employer for whom the tradesmen and apprentices will be working.
- (b) The Union members who are resident in the designated geographic area will be referred by the Union for employment through the EPSCA office. As much as their out-of-work lists will permit, the Unions will supply members on a fan-out basis from the project or work location.

The Employers will either hire such persons or substantiate their reasons in writing for not doing so.

An employee who maintained a regular residence within the geographic area for the purposes of employment and who relocates outside the geographic area will not be entitled to an increase in travel or room and board allowance entitlement as a result of this relocation.

- (c) If, after a request has been made, the Union is unable to supply sufficient tradesmen and apprentices to meet the manpower requirements of the Employers, the Employers may employ tradesmen and apprentices who are resident within the geographic area. ...

It was Hydro's belief that the geographic area for the project had in fact been established at the pre-job conference which took place in 1977, as contemplated by Article 12.01(b), and that that geographic area was limited to the area around Bowmanville (and the project). Accordingly,

shortly after Mr. Lynch began work, he was advised by Hydro that he was not eligible for employment, unless he found a place to live in Bowmanville and came back with a Bowmanville address. Mr. Lynch did that, and his employment was allowed to continue.

4. Mr. Lynch's real residence continued to be Huntsville, however, and he was disgruntled over the fact that he was not receiving what he refers to as "travel allowance" (it is agreed the claim is for "room-and-board allowance"). He accordingly went to the employment office several times through the remainder of 1982, but each time was told that he was not entitled. Mr. Lynch testified that he discussed the matter with a number of other unhappy employees in the same situation, as well as with a steward, but decided not to formally grieve the matter because "it wouldn't do any good". Throughout 1983 Mr. Lynch continued to grumble over the allowance, but still chose to do nothing about it.

5. In the spring of 1984 Mr. Lynch states that he and another employee came across a piece of paper lying on the floor, and read it. It was a copy of Article 19.2 of the collective agreement, as set out above. Armed with this piece of information, Mr. Lynch went to see the Hydro Personnel Manager, Mr. Ella. As it happens, Hydro had in January of that year come to an agreement with the Union to treat the "geographic area" of the project as extending to an area that encompassed Huntsville, and to pay board allowance from January 16, 1984 forward to anyone residing within that extended area but more than 97 kilometres from the project. On that basis, the grievor could claim a Huntsville residence and qualify both for employment *and* for board allowance.

6. Pursuant to Hydro's agreement with the union, Mr. Ella offered to pay the grievor board allowance from that time forward, and also retroactive to January 16, 1984, and the grievor accepted the payment. That was in the summer of 1984. Two or three months later, the grievor asked Mr. Ella for further retroactive board allowance, back to August 4, 1982. Mr. Ella told the grievor he had gotten all that he was entitled to. Several more months later the grievor was discussing the matter with others at the Union Hall, and someone told him he ought to grieve. So he did. By then it was June of 1985. Asked in cross-examination why he waited almost a year from the time of the initial payment to launch a grievance for the balance, the grievor replied: "What was the difference - I'd waited since 1982 anyway."

7. The respondent by way of defence raises two preliminary grounds of objection: *laches* and estoppel. It also maintains that, on the merits, Hydro properly viewed the "geographic area" as having been agreed to be confined to the Bowmanville area, and that the grievor therefore had no entitlement to employment *and* a board allowance prior to the extension of the geographic area in January of 1984.

8. Were we to go on to inquire into this matter, we are persuaded that we would have to hear the evidence of the parties going back to 1977, if only to determine whether Hydro itself was correct in advising the grievor in 1982 that residing in Bowmanville was a necessary condition to being rightfully employed. While the union argued that Hydro should have simply refused to hire the grievor and let him grieve, rather than give him the advice of taking up residence in Bowmanville, it is not clear that that argument by the union would be accepted by the Board, and the accuracy of Hydro's advice would, in any event, still be a relevant consideration, in fully assessing the conduct of the parties. The Board would have to further determine, in that regard, whether the grievor is estopped from claiming Huntsville as his residence for the purpose of board allowance, once he had claimed Bowmanville as his residence for the purpose of maintaining his employment. And beyond that, we would have to determine whether the union is estopped from bringing this

grievance for pre-January 1984 allowance by virtue of the overall agreement acceded to by Hydro at that time, and as a result of which the grievor was paid the money that he was.

9. But we are not going to go into that. Rather, we are persuaded that this is an appropriate case for the application of the doctrine of *laches*. As the arbitrator in *Algoma Steel*, (1973) 2 L.A.C. (2d) 231 (Andrews) put it, at page 250:

... That the equitable doctrine of *laches* does apply to arbitration cases is settled law. See: *Re Ottawa Newspaper Guild, Local 205, and Ottawa Citizen* (1965), 55 D.L.R. (2d) 26, [1966] 1 O.R. 669; *Re Ottawa Newspaper Guild and The Saanich Firefighters Union, Local 967, and District of Saanich* (1971), 22 D.L.R. (3d) 577, [1972] 2 W.W.R. 134. ...

There is always some element of prejudice to a party having to put in a defence after a delay of this magnitude, and there is simply no justification whatever for the delay which occurred here. The grievor was not, as found in *Canadian Westinghouse*, (1961) 12 L.A.C. 120 (Hanrahan), lulled into believing certain facts on the basis of the employer's representation. Rather, the grievor continued to challenge the employer's assertions throughout - he simply never got around to filing a grievance (until June of 1985). No new fact came to his attention in the "paper" that he found on the floor in the spring of 1984; that was merely an extract from the collective agreement, which was something that was readily available to him from the beginning. Considerable attention has been given in this province to the question of expediting the handling of grievances, especially in construction, and we think fairness here demands that the grievor would have pursued his perceived entitlement to board allowance a good deal less haphazardly than he did. As we are not, in the circumstances, of the view that the grievor ought now to be permitted to claim compensation for this stale grievance, we are all of the view that the grievance ought to be dismissed.

10. The grievance is accordingly dismissed.

0762-86-R Ontario Catholic Occasional Teachers' Association, Applicant, v. Ottawa Catholic Separate School Board, Respondent

Certification - Representation Vote - Pre-Hearing vote ordered in a constituency of occasional teachers - Whether vote should be conducted by mail

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

DECISION OF THE BOARD; July 25, 1986

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

4. The Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

all occasional teachers employed by the respondent in the Cities of Ottawa and Vanier and the Village of Rockcliffe, save and except those employees teaching in schools pursuant to Part X1 of the Education Act and employees in bargaining units for which any trade union held bargaining rights as of June 17, 1986.

For the purpose of this voting constituency definition, the terms “occasional teacher” and “teacher” have the meanings assigned to them by subsection 1(1) paragraphs 31 and 66 of the *Education Act*, R.S.O. 1980, c. 129 as amended, which provide:

- 31. “occasional teacher” means a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year;
- 66. “teacher” means a person who holds a valid certificate of qualification or a letter of standing as a teacher in an elementary or a secondary school in Ontario; R.S.O. 1980, c. 129, s. 1(1), par. 66; 1982, c. 32, s. 1(2).

We note that the respondent would have the Board add the words “in its English language schools” immediately before the words “save and except” and define “occasional teacher” as “teachers qualified as teachers pursuant to the Education Act” when defining the appropriate bargaining unit. It appears to us that each of those additions to the voting constituency definition would be redundant. The definition of the bargaining unit, however, is a matter to be determined under subsection 9(4) of the Act after the vote is conducted. If the respondent still takes this position after the vote, that should be made clear in the submissions it files in response to the Form 71 Notice of Report of Returning Officer, so that the matter can be set down for hearing.

5. All employees of the respondent in the voting constituency on the 30th day of June, 1986, who have neither voluntarily terminated their employment nor been discharged for cause between the 30th day of June, 1986, and the date the vote is taken will be eligible to vote.

6. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

7. The applicant asks that the vote be conducted by mail citing the Board’s decision in *The Board of Education for the Borough of York*, [1985] OLRB Rep. May 767. In our decision of July 25, 1986, in *Halton Roman Catholic Separate School Board*, [1986] OLRB Rep. July 962, we reviewed the matter of mailed ballot votes in certification applications affecting occasional teachers and set out our conclusions in the following paragraph of that decision:

20. In the *York* case, the Board refused to follow an earlier decision on the eligibility issue, saying:

... as Professor Laskin (as he then was) observed in *Re C.G.E.* (1959), 9 L.A.C. 342, the first look at a problem is not necessarily the correct look ...

In retrospect, it seems to us that the Board’s broad pronouncement on the superiority of mailed ballots in certification applications affecting occasional teachers may have been premature. While we do not suggest abandoning the mailed ballot for all but the most extreme cases, it seems to us that the use of mailed notice and central polls should be seriously considered in each

case. Without some experience of this method of voting in cases where the union has been given voters' names and addresses in advance in accordance with the *York* decision, there will be no way of assessing whether the more complex mailed ballot vote procedure is so clearly superior as to warrant continuing to incur its higher costs. Unless specifically addressed in the decision directing the vote, the method of voting in cases involving occasional teachers should be a matter for the Registrar. The Board's policy that notice of the vote be given by mail to eligible voters and that the names and addresses of those voters be given to the applicant are unaffected by this decision.

There have been no submissions in this matter which would affect the conclusion we came to in that decision. In this case, we see no reason to direct that the pre-hearing representation vote herein be conducted by mail.

8. The matter is referred to the Registrar.

3223-85-R Michael VanLandeghem, Applicant, v. Labourers' International Union of North America, Local 1036, Respondent, v. **Smale Bros. Company Limited**, Intervener

Bargaining Rights - Employee - Termination - Applicant not at work on application date and not an employee - No status to bring termination application

BEFORE: *Thomas S. Kuttner*, Vice-Chairman, and Board Members *W. G. Donnelly* and *R. Montague*.

APPEARANCES: *C. J. Abbass*, *Michael VanLandeghem* and *Kenneth J. Smale* for the applicant; *L. A. Richmond* and *J. Lewis* for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD; July 16, 1986

1. The name of the respondent is amended to read: "Labourers' International Union of North America, Local 1036."

2. At the hearing of this matter held at the offices of the Board on June 19, 1986, the Board granted a motion to dismiss, made by counsel for the respondent for the following reasons:

This is an application for termination of bargaining rights filed under the provisions of section 57 of the *Labour Relations Act*. The applicant, Michael VanLandeghem, has for many years been seasonally employed as a labourer in the employ of the intervener, Smale Bros. Company Limited. The employer operates a business as a utility contractor in Board Area 21.

At all relevant times the employer has been bound by the provisions of a collective agreement entered into on its behalf between the Utility Contractors' Association of Ontario and the Labourers' International Union of North America, Ontario Provincial District Council on behalf of its several locals including Local 1036, which holds the bargaining rights for construction labourers in the employ of Smale Bros. Company Limited in Board Area 21.

On March 26, 1986, the application date set by the Board in accordance with its normal practice and procedure, there was in the employ of the employer and present at work only one individual, Kenneth J. Smale, (see Schedule A of the employer's filings). Evidence was led as to the employment status of Mr. Smale, and the Board is satisfied that at all relevant times, and indeed for a period of time in excess of one year prior to the application for termination, he was employed as and performing the work of an operating engineer. Accordingly, Mr. Smale is not an employee in the bargaining unit for the purposes of this application.

No other employee was in the employ of the employer and present at work on the date of the application (March 26, 1986), and more particularly, the applicant was not so present or employed. The provisions of section 57(2) of the Act clearly stipulate that only an employee in the bargaining unit may make an application for termination of bargaining rights.

It has been the prevailing practice of the Board in determining whether a person is an employee in the bargaining unit, whether for the purposes of an application for certification or for those for termination in the construction industry, to have regard only to those persons actually present at work on the date of application. This practice and the rationale behind it were recently adopted by the Board in *Stuart Riel Masonry Contractors*, [1984] OLRB Rep. Nov. 1630 at para. 10 where the Board stated:

... Counsel for the employer is correct when he says there is nothing in section 57 of the Act which requires employees to be at work when an application is made. Section 57(3) requires a finding by the Board of the number of employees in the bargaining unit at the application date and the Board has complete discretion to do so, including whether employees not at work in the bargaining unit on the application date are to be counted. In the construction industry, because of the short term nature of the employment relationship, it has been the consistent policy of the Board over many years to count as employees only those employees at work on the application date. This applies equally to applications for certification and for termination of bargaining rights....

See also the decisions of the Board in *Uni-Form Builders Limited*, [1968] OLRB Rep. Apr. 60, *Howard S. Clark Construction*, [1968] OLRB Rep. Apr. 62, *Diplock Durable Floor Company Ltd.*, [1982] OLRB Rep. Aug. 1159, *T. E. Leroux Contracting Ltd.*, [1982] OLRB Rep. Aug. 1204. The Board's attention has been drawn to its decision in *Lakeview Sheet Metal (Orillia) Ltd.*, [1979] OLRB Rep. June 537 to the contrary, which it declines to follow or adopt.

Here as in *Uniform Builders* and *Howard Clark*, *supra*, the applicant not being an employee of Smale Bros. Company Limited and present at work on the date this application was filed, he was not an employee in the bargaining unit for which the respondent has bargaining rights as required by section 57(2) of the Act. Therefore he has no status to bring this application.

Accordingly, this application is dismissed.

2932-85-U A. K. Stuart, Complainant, v. Ontario Public Service Employees Union Local 560, Respondent

Colleges Collective Bargaining Act - Duty of Fair Representation - Financial Statements - Unfair Labour Practice - Local union membership policy not to provide financial statement to employees - Employee permitted access to financial information - Access to information not adequate for purposes of Act - Union donation of funds to other organizations contrary to union constitution not breach of duty of fair representation - Purely internal union matter

BEFORE: *Ken Petryshen*, Vice-Chairman, and Board Members *R. J. Gallivan* and *R. R. Montague*.

APPEARANCES: *Alan K. Stuart* for the complainant; *Alick Ryder*, *Glen Chochla*, *Mel Fogel* and *Ted Montgomery* for the respondent.

DECISION OF THE BOARD; July 15, 1986

1. The name of the respondent is amended to read: "Ontario Public Service Employees Union Local 560".
2. This is a complaint in which the complainant alleges the respondent has failed to comply with sections 76 and 87(2) of the *Colleges Collective Bargaining Act* (CCBA). At the hearing and on agreement of the parties, the Board heard the allegation relating to section 87(2) first and once this aspect of the complaint was finalized, proceeded to hear the allegation relating to section 76.
3. The following decision was rendered orally by the Board at its hearing in this matter on July 9, 1986, after it recessed to consider the material before it and the submissions of the parties with respect to the section 87(2) aspect of the complaint:

Mr. Stuart complains that the respondent has failed to furnish him with a copy of an audited financial statement as required by section 87(2) of the CCBA. By letter dated January 2, 1985 to Mr. Fogel, the respondent's president, Mr. Stuart requested a copy of the financial statement for the year ending 1984. Mr. Fogel denied the request in a letter to the complainant dated January 11, 1985 and confirmed the denial in a subsequent letter dated January 18, 1985. Section 87(2) of the CCBA provides as follows:

Every employee organization that represents employees shall upon the request of any employee furnish him, without charge, with a copy of the audited financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy, and, upon the complaint of any employee that the employee organization has failed to furnish such a statement to him, the Ontario Labour Relations Board may direct the employee organization to file with the Registrar, within such time as the Ontario Labour Relations Board may determine, a copy of the audited financial statement of its affairs to the end of its last fiscal year verified by the affidavit of its treasurer or other officer responsible for the handling and administration of its funds and to furnish a copy of such statement to such employees as the Ontario Labour Relations Board in its discretion may direct, and the employee organization shall comply with such direction according to its terms.

The Board heard from the parties with respect to their positions on this issue. The respondent argued that the Board should exercise its discretion in

favour of not directing the respondent to furnish the complainant with a copy of an audited financial statement. In taking this position the respondent referred to a policy adopted by the membership of Local 560. The policy of the Local on this issue is that it will not provide an employee with a copy of its financial statement but it will give the employee access to the information. In fact, Mr. Stuart was given access to the financial statements in that he was provided with and took advantage of an opportunity to review financial statements in the presence of local union officers.

After hearing from the parties and, in particular, after hearing the basis on which the respondent defends the section 87(2) complaint, it is the Board's view that it should exercise its discretion under section 87(2) in favour of the complainant. It appears to us that the will of the majority of the membership of a particular local union should not be the deciding factor in determining whether an employee will or will not receive a financial statement from its local union. It strikes us as well that the provision of access to the financial information, even on the terms on which this respondent indicated to us it provides access, does not satisfy the intent and objectives of section 87(2).

In the result, the Board orders that the respondent union deliver to the complainant, a copy of the audited financial statement for the year ending 1984. This statement must be certified by its treasurer or other officer responsible for the handling or administration of its funds. Such a statement and the supporting affidavit which is required by section 87(2) shall be delivered as soon as practicable and no later than July 23, 1986, to the complainant and the Registrar of the Board.

In making this decision the Board did not rely on any allegation made by the complainant with respect to the conduct of the officers of Local 560 on the occasion when Mr. Stuart reviewed the financial statements.

4. The complainant had initially alleged that the respondent's failure to provide him with an audited financial statement also contravened section 76 of the CCBA. When the Board gave its oral decision on the section 87(2) aspect of the complaint, the complainant requested leave of the Board to withdraw that part of his complaint. Given the Board's normal practice, the Board dismisses that part of Mr. Stuart's complaint which alleges the respondent contravened section 76 of the CCBA by not providing him with an audited financial statement.

5. The following decision was rendered orally by the Board at its hearing in this matter on July 9, 1986 after it recessed to consider the material before it and the submissions of the parties with respect to the section 76 aspect of the complaint which remained:

The complainant alleges that the respondent has contravened section 76 of the CCBA. The Board entertained submissions from both parties with respect to the facts relating to the complaint as well as the arguments they intended to make based on their version of the facts. In deciding this complaint we are prepared to assume, without deciding, that the facts as alleged by the complainant are accurate.

The grievor is employed in the academic staff bargaining unit of Seneca College. Beginning in mid-October 1984 and for approximately three weeks, the employees in this bargaining unit engaged in a lawful strike. This strike activ-

ity was brought to an end with the passage of Bill 130. This legislation imposed a collective agreement upon the relevant parties and provided that certain terms of the collective agreement would be determined by an arbitrator.

By means of a notice to all members of Local 560, M. Fogel, President of the local, advised the members that there would be a general membership meeting to be held on November 28, 1984 for the purpose of increasing the local dues assessment by \$2.50 per week per member. For reasons not here relevant, the complainant elected not to attend this meeting. At the meeting, a motion was made from the floor that the local union donate certain monies to another organization. This motion was eventually carried.

The complainant alleges that in accepting the motion, the president was not acting in accordance with what the notice of the meeting specified and violated certain provisions contained in the union's constitution. The complainant argued that by donating funds by means of a procedure contrary to the union's constitution, the union contravened section 76 of the CCBA. He argues that this action of the president and the local union impacts on the way in which the union will be able to represent him and other employees with the employer. He suggests money was put into the strike fund in one instance and then removed without notice to the membership contrary to the union's constitution.

We heard argument from both parties as to whether or not the president contravened the constitution. It was also argued by the respondent that the Board should not entertain the complaint since the complainant did not exhaust the union's internal procedures. In addition, the respondent argued that the complaint does not constitute a violation of section 76 of the CCBA since the circumstances do not concern a question of representation, but simply relate to an internal union matter.

As indicated earlier, we are prepared to assume Mr. Stuart's version of the facts is the correct version. Specifically, we are prepared to assume, without deciding, that contraventions of the constitution occurred at the local union meeting held on November 28, 1984. Assuming these facts to be true, we are not satisfied that the complainant has demonstrated that the respondent has contravened section 76 of the CCBA.

Section 76 of the CCBA provides as follows:

An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

The Board has reviewed in previous decisions the nature of the conduct of trade unions which is regulated by unfair representation sections such as the one before us in the instant case. The duty of fair representation in section 76 is concerned only with the representation by a trade union of an employee vis-a-vis his or her employer. In *Arthur Joseph Roberts*, [1974] OLRB Rep. March 169 the Board stated:

8. ... the duty of fair representation owed by a trade union to an employee under sec-

tion 60 [now section 68] of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour vis a vis its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member to the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (See *White v Kuzych* (1951), A.C. 585; *Lee v Showmans Guild* (1952), All. E.R. 1175; *Orchard v Tunney* (1957), S.C.R. 436; 8 D.L.R. 273; *Jurak et al v Cunningham* (No. 1) (1959), 20 D.L.R. (2d) 377; *Jurak et al v Cunningham* (No. 2) (1959), 20 D.L.R. (2d) 381; *Gee v Freeman et al* (1958), 26 W.W.R. 546).

The Board also stated the following in *Frank Manoni*, [1981] OLRB Rep. Dec. 1775:

... The arbitrary, discriminatory or bad faith conduct, directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice to those employees at the *hands of their employer*.

The principles set out in these decisions are relevant in this case. We are satisfied that the real issue between the complainant and the respondent is an internal union matter. It has not been demonstrated that the actions of the union have produced any actual prejudice to the complainant or any other employee. The concerns raised by the complainant are merely speculative, and, in substance, they have nothing to do with the actual representation this local union provides the complainant and other employees in the unit vis-a-vis their employer.

Therefore, the complaint relating to an alleged contravention of section 76 of the CCBA is dismissed.

0895-86-R United Food and Commercial Workers International Union, Local 1000A, Applicant, v. Sunnybrook Foods Limited, Respondent

Bargaining Unit - Certification - Representation Vote - Termination - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *Kevin Corporon*, *Pat MacFarlane* and *Yvonne Ritchie* on behalf of the applicant; *James G. Knight* and *Julius Goodbaum* on behalf of the respondent.

DECISION OF THE BOARD; July 23, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The Board received representations from counsel with respect to the description of the appropriate bargaining unit and the exercise of the Board's discretion to order a representation vote in the circumstances of this case. Following the submissions of counsel, the Board recessed, and then returned and delivered the following oral decision:

This is an application for certification in which the applicant seeks to represent a bargaining unit of employees that is described in the collective agreement that expired July 6, 1986 between the respondent and Local Union 206, National Council of Canadian Labour, which the parties agree has been succeeded by the Canadian Brotherhood of Railway Transport and General Workers.

The bargaining unit described in that expired collective agreement is:

"ARTICLE 2 - RECOGNITION"

2.01 The Company recognizes that the Union as the sole and exclusive collective bargaining agency with respect to all matters arising under this Agreement for all employees in its stores in Ontario, save and except Department Managers, Porters, Head Office and Warehouse Staff, employees employed for not more than twenty-eight (28) hours per week and students employed during the Easter vacation, the Christmas vacation or the period May 14th to September 17th inclusive."

The solicitors for the applicant, who are also the solicitors for the Canadian Brotherhood of Railway Transport and General Workers, filed the following letter dated July 14, 1986 with the Board:

"DELIVERED"

Mr. D. K. Aynsley,

Registrar,

Ontario Labour

Relations Board,

400 University Ave.,

TORONTO, Ontario.

Dear Mr. Aynsley:

Re: Application for Certification United Food & Commercial Workers Int. Union, Local 1000A Board File: 0895-86-R

This is to advise you that I act as counsel for the applicant in the above noted matter. I also act on behalf of the Canadian Brotherhood of Railway Transport and General Workers (C.B.R.T.). As you are aware, the C.B.R.T. is presently the bargaining agent of the unit affected by the within application for certification. Mr. Beckwith has instructed me to advise the Board that the C.B.R.T. will not intervene in this matter as it is no longer interested in the bargaining rights, which is the subject of this appli-

cation for certification. As such, the C.B.R.T. is hereby withdrawing any interest it may have in the aforesaid bargaining rights.

If you have any questions or comments concerning this matter, please do not hesitate to contact me.

Yours truly,

CAVALLUZZO HAYES & LENNON

"P. Cavalluzzo"

Paul J.J. Cavalluzzo

Copies: R. Beckwith C.B.R.T.

K. Corporon U.F.C.W."

Counsel for the respondent submitted that as this application was a displacement application, a vote should be directed, but since the incumbent union abandoned any interest in the matter, it should be a yes/no vote. Counsel argued that the existence of the incumbent, which had been the bargaining agent for the employees in the bargaining unit since 1972, made the membership evidence filed by the applicant equivocal. Counsel relied on *Carleton University*, [1975] OLRB Rep. Apr. 308; and *Unlimited Textures* [1984] OLRB Rep. Jan. 138. This point was expressed in the following way in *NCR Canada Ltd.* [1974] OLRB Rep. Dec. 847 at paragraph 8:

"Notwithstanding the membership evidence of an applicant, the very existence of such an intervener, provided its bargaining rights have not been abandoned, casts a doubt on the true wishes of the employees which is most appropriately resolved by the taking of a representation vote."

We do not accept that submission. In our view, the fact that an employee is represented in collective bargaining by one union when he or she joins another union does not make the evidence of membership of that employee equivocal. The Board in *Famz Foods Limited* [1985] OLRB Rep. June 857 dealt directly with this issue at paragraph 21 where it wrote:

"We were troubled by the statement in *NCR Canada Ltd.* quoted in paragraph 18 above. Our task is to consider employee wishes as of the terminal date. CURRE had not abandoned its rights at that time. On the theory advanced in *NCR*, CURRE's existence 'casts doubt' on the true wishes of employees at that time just as a numerically relevant petition would, with the same consequence for the exercise of the Board's discretion. The weak link in this chain of reasoning is the statement in *NCR* itself. The theory that an incumbent's mere existence 'casts doubt' on employee wishes is simply wrong. There is a critical difference between a relevant petition and pre-existing bargaining rights when assessing their effect on an application for membership or other membership evidence which is otherwise reliable as a measure of the desire of an employee to be represented by an applicant. Incumbent bargaining rights will necessarily predate any fresh membership evidence on which outright certification might be granted, while signatures on a petition are 'relevant' only to the extent they postdate membership evidence filed on behalf of the signatory. The last significance of wishes before the terminal date is ordinarily the most relevant to the question of wishes as of that date: see *Baltimore Aircoil Interamerican Corporation*, *supra* at paragraph 49. It is not some constructive doubt about membership evidence that warrants directing a vote in displacement situations, it is faithfulness to the theme expressed in *Canadian John Wood Manufacturing Co. Ltd.*, 46 CLLC 16,449 and

reflected in the termination provisions of the *Labour Relations Act*: no matter how many employees have signed in support of termination of an incumbent's bargaining rights, those rights should not be terminated without a vote. That policy reflects respect for acquired trade union rights, not concern about employee confusion. That policy does not apply, and the pre-existence of bargaining rights does not alone warrant directing a vote, if the incumbent advises the Board that it does not wish, for whatever reason, to continue representing the unit."

Where an incumbent bargaining agent indicates that it no longer wishes to represent employees in a certification proceeding, the Board does not normally exercise its discretion to order a representation vote but rather certifies the applicant without a representation vote where the applicant has the requisite level of membership among the employees in the bargaining unit. See *Famz Foods Limited*, [1984] OLRB Rep. Dec. 1714 at paragraph 6; *The Mara's Bread Limited*, [1965] OLRB Rep. June 156 and *The Craig Bit Company Limited*, [1978] OLRB Rep. May 411.

Counsel for the respondent also argued that if the Board found that no vote needed to be directed as a result of the incumbent union abandoning its bargaining rights, this application for certification should be treated as a fresh application, and not as a displacement application. He argued that the bargaining unit sought by the applicant would not be an appropriate bargaining unit in these circumstances since the application is no longer a displacement application because the incumbent union has abandoned its bargaining rights. The respondent has five locations in different municipalities throughout the province of Ontario. Counsel submitted that five full-time bargaining units were appropriate in this case to reflect the locations of the respondent in each municipality. Counsel also argued that the definition of full-time employee should be based on twenty-four hours per week instead of twenty-eight hours per week.

The respondent and applicant are parties to a collective agreement in respect of the respondent's part-time employees. That collective agreement contains the following recognition clause:

"ARTICLE 1 - RECOGNITION

1.01 The Employer recognizes the Union as the bargaining agent of all employees of the Employer at its stores in the Province of Ontario, regularly employed for not more than twenty-eight (28) hours per week, save and except Department Managers, Head Office and Warehouse Staff and Porters."

There was no reason advanced by counsel for the applicant to change the basis of determining full-time employees from 28 to 24 hours per week other than the Board's normal practice in certification applications.

In our opinion, this application is a displacement application for certification. The bargaining unit which the incumbent union represented was appropriate for collective bargaining. The mere fact that the incumbent union has indicated that it no longer wishes to represent the employees does not change the character of this application, particular where, as here, the certification application was made during the last two months of the recently expired collective agreement. We do not see how the change in the identity of the employees' bargaining agent in this case can render a bargaining unit

that was appropriate for collective bargaining now inappropriate for collective bargaining.

Therefore, we find that all employees of the respondent in its stores in Ontario, save and except department managers, porters, head office and warehouse staff, employees employed for not more than twenty-eight hours per week and students employed during the Easter vacation, the Christmas vacation or the period May 14 to September 17 inclusive constitute a unit of employees of the respondent appropriate for collective bargaining.

4. Following the Board's oral ruling, the Board reviewed the lists of employees in the bargaining unit and the membership evidence filed by the applicant.
5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 10, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.
6. A certificate will issue to the applicant.

0430-86-R Ontario Catholic Occasional Teachers' Association, Applicant, v. Windsor Roman Catholic Separate School Board, Respondent

Bargaining Rights - Bargaining Unit - Certification - Whether occasional teachers fall within bargaining unit for which another trade union already had bargaining rights - Position of occasional teachers under Bill 100 - Appropriate bargaining unit for occasional teachers

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *F. W. Murray* and *P. J. O'Keefe*.

APPEARANCES: *Susan Ursel*, *Ray Fredette* and *Mary Mosher* for the applicant; *Paul Mullins* for the respondent.

DECISION OF THE BOARD; July 23, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The Board finds that all occasional teachers employed by the respondent in the City of Windsor, save and except employees in bargaining units for which any trade union held bargaining rights as of May 12, 1986, constitute a unit of employees of the respondent appropriate for collective bargaining. The phrase "occasional teacher" has the meaning assigned to it by section 1(1) 31 of the *Education Act* R.S.O. 1980, c.129, as amended.
4. As of May 12, 1986, the respondent and the Ontario Public Service Employees Union

("OPSEU") were parties to a collective agreement with effect from January 1, 1984 to December 31, 1985, covering:

all employees of the Windsor Roman Catholic Separate School Board in Windsor, save and except co-ordinator - student services, curriculum materials consultant, persons above such ranks, persons employed for not more than twenty-four (24) hours per week, and persons covered by subsisting collective agreements,

a unit for which OPSEU had been certified on September 28, 1983, in Board File No. 0581-83-R. A clarity note which appears in the several decisions issued by the Board in that matter lists the following classifications as falling within that unit: audio-visual technician, attendance counsellor, library technician, psychologist, chief psychologist, social worker and speech pathologist. The collective agreement establishes salary levels only for employees in those classifications. It appears from the Board decision in Board File 0581-83-R that when the parties turned their minds to the question whether there were any unrepresented employees other than those employed in those classifications, the only unrepresented category then identified to the Board was "teaching assistant". The expectation reflected in the Board's decisions is that teaching assistants would be excluded from the "tag-end" unit for which OPSEU was being certified in that matter because those teaching assistants were regularly employed for not more than twenty-four hours per week. It appears the parties to those proceedings overlooked occasional teachers. The Board obviously did not have them in mind when it defined the unit for which it certified OPSEU. OPSEU and the respondent did not address occasional teachers in their collective agreement. The respondent does not claim that OPSEU has bargaining rights for any occasional teachers. OPSEU was given notice of this application and has not intervened to claim bargaining rights for occasional teachers employed by the respondent.

5. As of May 12, 1986, Service Employees Union, Local 210 affiliated with Service Employees International Union ("Local 210") held bargaining rights with respect to:

all employees of the Windsor Roman Catholic Separate School Board in Windsor save and except supervisors, persons above the rank of supervisor and employees and bargaining units for which any trade union held bargaining rights as of June 5, 1985,

a unit for which they were certified June 28, 1985, in Board File No. 0572-85-R. A review of that file discloses that teaching assistants were the only employees whom the parties to the application then considered to be affected by it. It appears they overlooked occasional teachers. The Board would not have had them in mind when it adopted the parties' agreement to this "tag-end" bargaining unit description. Local 210 was given notice of this application. It did not intervene to claim bargaining rights for occasional teachers employed by the respondent. The respondent does not suggest that Local 210 has bargaining rights for any occasional teachers.

6. The labour relations of permanent and probationary teachers (as those terms are defined by the Education Act) who are "employed by a board... as a teacher" are generally governed by the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c.464 (often referred to as "Bill 100"). As the Board noted in *Board of Education for the City of York*, [1985] OLRB Rep. May 767 (at paragraph 5):

...Bill 100 does not apply to all teachers. Occasionals have been excluded, and, by default fall under the *Labour Relations Act*. It is not clear why they were omitted. There is no indication that the Legislature ever turned its mind to their situation.

• • •

8. It may well be (as the Matthews Commission suggests) that the *Labour Relations Act* is not

suitable for the public education sector. But for occasionals, it is their only alternative. Although they are qualified teachers they are not included in the bargaining system which covers their professional peers. By default, they fall within the ambit of the *Labour Relations Act*. This creates something of an anomaly. It would be much simpler if one could say that all qualified teachers employed to teach are covered by the general legislation governing teacher collective bargaining. But that is not the case...

It has been the Board's experience that until relatively recently school boards and unions that represent their non-teacher employees have not thought of occasional teachers as employees who might be the subject of or affected by collective bargaining under the *Labour Relations Act*. When they have been the subject of trade union organizing, they have been organized separately from other employee groups. Because of their affinity with "Bill 100" teachers, the Board has placed them in separate bargaining units -- if effect, "tag ends" to Bill 100 units. It seems clear to us that neither the Board nor the parties intended to deal with occasional teachers in the certification applications referred to in paragraphs 4 and 5 above. There is no indication that either OPSEU or Local 210 exercised or thought it had bargaining rights with respect to occasional teachers. Having regard to the foregoing and the fact that neither OPSEU nor Local 210 has sought to intervene in this application, we find that occasional teachers employed by the respondent do not fall within any bargaining unit for which any trade union had bargaining rights when this application was made.

7. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 23, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of that Act in this application.

8. Accordingly, a certificate shall issue to the applicant with respect to the bargaining unit described in paragraph 3 hereof.

CASE LISTINGS JUNE 1986

	PAGE
1. Applications for Certification	159
2. Applications for Declaration of Related Employer.....	173
3. Sale of a Business	174
4. Applications for Declaration Terminating Bargaining Rights.....	175
5. Applications for Declaration of Unlawful Strike	176
6. Applications for Declaration of Unlawful Strike (Construction Industry)	177
7. Applications for Declaration of Unlawful Lockout.....	177
8. Complaints of Unfair Labour Practice	177
9. Applications for Consent to Prosecute.....	181
10. Applications for Religious Exemption.....	181
11. Applications for Consent to Early Termination of Collective Agreement	181
12. Financial Statement	181
13. Jurisdictional Disputes	181
14. Applications for Determination of Employee Status.....	181
15. Complaints Under the Occupational Health & Safety Act	182
16. Construction Industry Grievances	183
17. Applications for Reconsideration of Board's Decision	186

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1986

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0438-84-R: Ontario Secondary School Teachers' Federation, (Applicant) v. Board of Education for the City of Etobicoke, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all occasional teachers employed by the respondent in its secondary school panel in the City of Etobicoke, save and except persons for which any trade union held bargaining rights as of the date of the application." (164 employees in unit).

1941-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Dominion Paving Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (23 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (23 employees in unit).

1942-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Dominion Paving Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (1 employee in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (1 employee in unit).

1991-84-R: Health, Office & Professional Employees, a division of Local 206 United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Applicant) v. Century Manor Health Care Centre, (Respondent).

Unit: "all employees of the respondent in Brighton, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff." (27 employees in unit).

2561-84-R: Ontario Public School Teachers' Federation, (Applicant) v. The Board of Education for the City of Windsor, (Respondent).

Unit: "all occasional teachers employed by the respondent in its elementary panel in the City of Windsor, save and except employees for which any trade union held bargaining rights as of December 17, 1984." (102 employees in unit). (*Having regard to the agreement of the parties*).

2803-84-R: Ontario Nurses' Association, (Applicant) v. Algoma District Home for the Aged, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Thessalon, save and except the Director of Nurses and Assistant Director of Nurses, persons above the rank of Director of Nurses and Assistant Director of Nurses, and persons regularly employed for not more than twenty-four hours per week." (12 employees in unit).

Unit #2: "all registered and graduate nurses regularly employed for not more than twenty-four hours per week in a nursing capacity by the respondent at Thessalon, save and except Director of Nursing, Assistant Director of Nursing, and persons above the rank of Director of Nursing and Assistant Director of Nursing." (12 employees in unit).

1373-85-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.f. of L., C.I.O., C.L.C., (Applicant) v. North York General Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, secretaries to: President, Vice-President of Medical Affairs, Director of Personnel and Labour Relations, Director of Financial Services, Director of Hospital Services, Director of Support Services, Director of Nursing Services; Personnel Assistant, Benefits Co-ordinator, Personnel Records Clerks, Clerk Typist-Personnel, Clerk Typist-Nursing, Nursing Staff Assistant, Senior Payroll Technicians, Accounting Clerk-General Accounts, Assistant Accountant, Computer Operators, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of September 3, 1985." (140 employees in unit).

1639-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Rowad Pipeline Company Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

1740-85-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Star Bottling Works Inc., (Respondent).

Unit: "all employees of the respondent in North Bay, Ontario, save and except department managers, persons above the rank of department manager, office and clerical staff, and students employed during the school vacation period." (7 employees in unit).

2434-85-R: Ontario Secondary School Teachers' Federation, (Applicant) v. The Simcoe County Board of Education, (Respondent) v. L'Association des enseignantes et enseignants suppléants de Simcoe secondaire, (Intervener).

Unit: "all occasional teachers employed by the Simcoe County Board of Education in its secondary schools and classes in the County of Simcoe where Francais is the language of instruction in accordance with Part XI of the Education Act, save and except employees in bargaining units for which any trade union held bargaining rights on January 6, 1986." (235 employees in unit). (*Having regard to the agreement of the parties*).

2469-85-R: Retail, Wholesale and Department Store Union, (Applicant) v. 517975 Ont. Inc. c.o.b. Torrance I.G.A., (Respondent).

Unit #1: “all employees of the respondent at Torrance, Ontario, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at Torrance, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager.” (2 employees in unit). (*Having regard to the agreement of the parties*).

2786-85-R: Toronto Typographical Union No. 91, (Applicant) v. Condor Laminations, Division of Purity Packaging, Division of Innopac Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical, sales, laboratory staff, employees regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.” (54 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

2858-85-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the Town of Parkhill, (Respondent).

Unit: “all employees of the respondent in Parkhill, save and except Clerk-Treasurer, work supervisor, persons above the rank of work supervisor, secretary to the Clerk-Treasurer and Council, and students employed during the school vacation period.” (6 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3084-85-R: Energy & Chemical Workers Union, (Applicant) v. Pennwalt Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of Pennwalt Inc. in its Chemical Specialties Division of Oakville, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, laboratory and technical staff, and students employed during the school vacation period.” (42 employees in unit).

3194-85-R: Service Employees International Union Local 204, (Applicant) v. Alders International (Canada) Limited, (Respondent).

Unit #1: “all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (93 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed Without Vote*).

0039-86-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Corporation of the County of Bruce, Brucelea Haven, Home for the Aged, (Respondent).

Unit #1: “all employees of the respondent in Walkerton, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (66 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

0157-86-R: Service Employees Union, Local 663, (Applicant) v. Lennox and Addington County General Hospital Association, (Respondent).

Unit #1: "all paramedical employees of Lennox and Addington County General Hospital Association in the Township of Richmond, save and except Directors, persons above the rank of Director, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons in bargaining units for which other trade unions held bargaining rights as of April 15, 1986." (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all paramedical employees of the Lennox and Addington County General Hospital in the Township of Richmond regularly employed for not more than twenty-four hours per week and students employed as paramedical employees during the school vacation period, save and except Directors, persons above the rank of Director, and persons in bargaining units for which other trade unions held bargaining rights as of April 15, 1986." (4 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0221-86-R: Association of Allied Health Professionals: Ontario, (Applicant) v. Ottawa Civic Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all physiotherapists, occupational therapists, pharmacists and therapeutic dietitians in the employ of the respondent in Ottawa, regularly employed for less than 22.5 (twenty-two and one half) hours per week, save and except supervisors, persons above the rank of supervisor, and employees for whom any trade union held bargaining rights as of June 3, 1986." (22 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0235-86-R: United Steelworkers of America, (Applicant) v. Airtex Manufacturing Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Newmarket, Ontario, save and except foremen; persons above the rank of foreman, office and sales staff, and service technicians." (43 employees in unit).

0238-86-R: Service Employees Union, Local 478, (Applicant) v. St. Joseph's General Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all paramedical employees of the respondent at Elliot Lake, Ontario save and except supervisors, persons above the rank of supervisor and persons from whom any trade union held bargaining rights on April 17, 1986." (12 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0246-86-R: Service Employees International Union Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. The Adult Cerebral Palsy Institute of Metropolitan Toronto, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except occupational therapists, social workers, community service workers, team leaders, persons above the rank of team leader, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0264-86-R: Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. The Derby Pet Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Brampton and the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period." (33 employees in unit).

0289-86-R: United Steelworkers of America, (Applicant) v. Cashway Building Centres (Division of Canadian Corporate Management Co. Ltd.), (Respondent).

Unit #1: "all employees of the respondent in the City of North Bay save and except foreman, persons above

the rank of foreman, office clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (5 employees in unit).

Unit #2: “all employees of the respondent in the City of North Bay save and except supervisor, persons above the rank of supervisor, office staff, yardmen, truck drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (5 employees in unit).

0295-86-R: United Food & Commercial Workers International Union, (Applicant) v. Omstead Foods Port Stanley Limited, (Respondent).

Unit: “all employees of the respondent in the Town of Port Stanley save and except assistant manager, persons above the rank of assistant manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (16 employees in unit). (*Having regard to the agreement of the parties*).

0305-86-R: L'Association des enseignantes et enseignants suppléants de Stormont, Dundas et Glengarry separe elementaire, (Applicant) v. Le Conseil des ecoles separees catholiques des comtes de Stormont, Dundas et Glengarry, (Respondent).

Unit: “all occasional teachers employed by the respondent in its elementary-schools and classes where francais is the language of instruction, in accordance with part XI of the *Education Act*, in the Counties of Stormont, Dundas and Glengarry, save and except employees for whom any trade union held bargaining rights as of April 28, 1986.” (82 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0316-86-R: Ontario Catholic Occasional Teachers Association, (Applicant) v. The Hamilton-Wentworth Roman Catholic Separate School Board, (Respondent).

Unit: “all occasional teachers employed by the respondent in its schools in the Regional Municipality of Hamilton-Wentworth, save and except persons for which any trade union held bargaining rights as of April 30, 1986.” (83 employees in unit). (*Having regard to the agreement of the parties*).

0331-86-R: Ontario Catholic Occasional Teachers' Association, (Applicant) v. Brant County Roman Catholic Separate School Board, (Respondent).

Unit: “all occasional teachers employed by the respondent in its schools in the County of Brant, save and except employees in bargaining units for which any trade union held bargaining rights as of May 2, 1986.” (51 employees in unit). (*Having regard to the agreement of the parties*).

0368-86-R: Canadian Union of Public Employees, (Applicant) v. Rotary Laughlen Centre, (Respondent).

Unit #1: “all employees of the respondent in Metropolitan Toronto, save and except Registered, Graduate and Undergraduate Nurses, office and clerical employees, supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (41 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Registered, Graduate and Undergraduate Nurses, office and clerical employees, supervisors and persons above the rank of supervisor.” (17 employees in unit). (*Having regard to the agreement of the parties*).

0373-86-R: United Steelworkers of America, (Applicant) v. Bristol Machine Works Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Sudbury, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period.” (25 employees in unit). (*Having regard to the agreement of the parties*).

0373-86-R: Ontario Public Service Employees Union, (Applicant) v. Sault Ste. Marie General Hospital, (Respondent).

Unit: "all medical laboratory technologists, technicians and assistants regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period by the respondent in its department of medical laboratory in Sault Ste. Marie, save and except charge technologists, persons above the rank of charge technologists, persons above the rank of charge technologists, students in training, office and clerical employees and students in bargaining units for which any trade union held bargaining rights as of May 6, 1986 being the date of application." (7 employees in unit). (*Having regard to the agreement of the parties*).

0399-86-R: Ontario Nurses' Association, (Applicant) v. Carewell Corp. Ltd., (Respondent).

Unit: "all registered and graduate nurses of the respondent at Cobourg, Ontario, save and except the Director of Resident Care and persons above the rank of Director of Resident Care." (5 employees in unit). (*Having regard to the agreement of the parties*).

0416-86-R: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, (Applicant) v. Bramfield Restaurants Limited, (Respondent).

Unit: "all full-time and part-time male and female employees of the respondent employed in the beverage department in the licensed establishment presently known as Cornelius Tavern located at 579 Yonge Street in the Municipality of Metropolitan Toronto primarily employed as tapmen, bartenders, beverage waiters, bar boys and improvers." (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0417-86-R: United Steelworkers of America, (Applicant) v. Teck-Corona Operating Corporation, (Respondent).

Unit: "all employees of the respondent at Hemlo (Highway 17, approximately 37 kilometres east of the Town of Marathon), save and except supervisors, persons above the rank of supervisor, security staff, office, technical and sales staff and students employed during the school vacation period." (126 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0432-86-R: United Steelworkers of America, (Applicant) v. Walter Tool and Die Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Barrie, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (34 employees in unit).

0460-86-R: Ontario Nurses' Association, (Applicant) v. Perth Community Care Centre, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Perth, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week." (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity for not more than 24 hours per week by the respondent in the Town of Perth, save and except the Director of Nursing and persons above the rank of Director of Nursing." (5 employees in unit). (*Having regard to the agreement of the parties*).

0464-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. N.E.R. Rentals Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and main-

taining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0472-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America UAW, (Applicant) v. Kew Plate Inc., (Respondent).

Unit: “all employees of the respondent in the City of Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

0480-86-R; 0481-86-R: The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant) v. Super-Van Conversions Inc., Robertson & Dawson Ltd., (Respondents) v. Group of Employees, (Objectors).

Unit #1: “All employees of Super-Van Conversions Inc. and Robertson & Dawson Ltd. in the City of Oshawa save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (44 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

0500-86-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Applicant) v. Tempo Plastics Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Township of Innisfil, save and except foremen persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period.” (59 employees in unit). (*Having regard to the agreement of the parties*).

0533-86-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Interwide Mechanical and Contracting Ltd., (Respondent).

Unit #1: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

Unit #2: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

0544-86-R: The Canadian Union of Postal Workers, (Applicant) v. Pritchard Building Services Ltd., (Respondent).

Unit: “all employees of the respondent at 280 Progress Avenue in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor.” (12 employees in unit). (*Having regard to the agreement of the parties*).

0547-86-R: Ontario Public Service Employees Union, (Applicant) v. Catulpa-Tamarac (Orillia) Child & Family Services Inc., (Respondent).

Unit: “all employees of the respondent in the County of Simcoe save and except supervisors and persons above the rank of supervisor, executive secretary, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (48 employees in unit). (*Having regard to the agreement of the parties*).

0551-86-R: International Woodworkers of America, (Applicant) v. Koolatron Corporation, (Respondent).

Unit: "all employees of the respondent in Brantford, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (71 employees in unit). (*Having regard to the agreement of the parties*).

0565-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. G.R.W. Industries (1985) Limited, (Respondent).

Unit: "all employees of the respondent at Huron Park, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (32 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0572-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant) v. Kingsbury Machine Tool (Canada) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its Kingsbury Manufacturing Division in Burlington, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, and students employed during the school vacation period." (121 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0581-86-R: United Steelworkers of America, (Applicant) v. Tecsyn Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its G.W.B. Rope & Twine Division in Orillia, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (110 employees in unit). (*Having regard to the agreement of the parties*).

0584-86-R: Ontario Public Service Employees Union, (Applicant) v. Sacred Heart Child and Family Centre, (Respondent).

Unit #1: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, professional staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (69 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed Without Vote*).

Unit #3: "all professional staff of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week." (69 employees in unit). (*Having regard to the agreement of the parties*).

Unit #4: "all professional staff of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor." (69 employees in unit). (*Having regard to the agreement of the parties*).

0585-86-R: Labourers' International Union of North America, Local 837, (Applicant) v. Stevensville Concrete, (Respondent).

Unit #1: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0639-86-R: Bakery Confectionery & Tobacco Workers International Union, Local 181, (Applicant) v. Dough Delight Ltd., (Respondent).

Unit: “all employees of the respondent at the Township of Vaughan, Ontario, save and except supervisors, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (167 employees in unit). (*Having regard to the agreement of the parties*).

0656-86-R: Local 47 Sheet Metal Workers’ International Association, (Applicant) v. Blackhawk Automotive, (Respondent).

Unit #1: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0683-86-R: Labourers’ International Union of North America, Local 837, (Applicant) v. Malnic Contracting Inc., (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (26 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (26 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0744-84-R: Ontario Secondary School Teachers’ Federation, (Applicant) v. Niagara South Board of Education, (Respondent).

Unit: “all occasional teachers employed by the respondent in its secondary panel in the District of Niagara South, save and except persons covered by subsisting collective agreements.” (97 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		107
Number of persons who cast ballots	58	
Number of ballots marked in favour of applicant		56
Number of ballots marked against applicant		2

0114-86-R: London and District Service Workers’ Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Murphy Manor, (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit: “all employees of the employer save and except registered nurses, supervisors, persons above the rank of supervisor, office staff and residents of the Home who assist in various duties, e.g. maintenance and kitchen and other duties.” (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of person on revised voters’ list		16
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		12

Number of ballots marked in favour of intervener

0

0243-86-R: Union Workers of Manufacturing Products and Office Personnel, (Applicant) v. Mercedes Textiles Limited, (Respondent) v. International Woodworkers of America, (Intervener).

Unit: "all employees of the respondent in Hawkesbury, Ontario, save and except foremen and forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (18 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		8
Number of ballots marked in favour of intervener		9

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3013-85-R: Toronto Typographical Union No. 91, (Applicant) v. Starways Distributors, A Division of Harlequin Enterprises Limited, (Respondent) v. The Southern Ontario Newspaper Guild Local 87, Newspaper Guild, (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (129 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant		0
Number of ballots marked in favour of intervener		8
Number of ballots marked in favour of no trade union		5
Ballots segregated and not counted		1

3091-85-R: United Steelworkers of America, (Applicant) v. C. H. Heist (Canada) Limited, (Respondent) v. Ontario Council of The International Brotherhood of Painters and Allied Trades, (Intervener).

Unit: "all employees of the respondent employed in hydro cleaning and dry and wet vacuum cleaning working at and out of Oakville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		6
Number of ballots marked in favour of intervener		0

0010-86-R: United Steelworkers of America, (Applicant) v. C. H. Heist (Canada) Limited, (Respondent) v. Ontario Council of the International Brotherhood of Painters and Allied Trades and Its Local 205, (Intervener).

Unit: "all employees of the respondent working at and out of Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and collective agreement between it and C.H. Heist Ltd. with effect from June 1, 1984 through November 30, 1986; (b) persons employed in the bargaining unit for which The International Brotherhood of Painters and Allied Trades and the Ontario Council of The International Brotherhood of Painters and Allied Trades ("the Painters") was recognized in a collective agreement between them and The Ontario Painting Contractors Association, Acoustical Association Ontario and Interior Systems Contractors Association of Ontario dated May 1, 1984; and (c) persons employed in bargaining units, if any, for which any trade union other than United Steelworkers of America, the Painters, or any affiliate of any of them held bargaining rights as of April 1, 1986." (81 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		2
Number of ballots marked in favour of intervener		1

0039-86-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Corporation of the County of Bruce, Brucelea Haven, Home for the Aged, (Respondent).

Unit #1: (See: *Bargaining Agents Certified Without Vote*).

Unit #2: "all employees of the respondent in Walkerton regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff." (25 employees in unit).

Number of names of persons on list as originally prepared by employer		22
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		1

0095-86-R: Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Northwestern General Hospital, (Respondent) v. Canadian Union of Operating Engineers & General Workers Local 101, (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, supervisors and foremen, persons above the rank of supervisor and foreman, office staff, and employees in bargaining units for which any trade union held bargaining rights as of April 9, 1986." (92 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		87
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant		2

0103-86-R: Ontario Secondary School Teachers' Federation, (Applicant) v. The Bruce County Board of Education, (Respondent).

Unit: "all occasional teachers employed by the respondent in its Secondary School panel in the County of Bruce, save and except employees in the bargaining units for which any trade union held bargaining rights as of April 10, 1986". (55 employees in unit).

Number of names of persons on revised voters' list		91
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		20
Number of ballots marked against applicant		3

0192-86-R: Consolidated Beef Corporation Employees' Association, (Applicant) v. Consolidated Beef Corporation, (Respondent) v. United Food and Commercial Workers International Union, (Intervener).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (54 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		58
Number of persons who cast ballots	46	

Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	43	
Number of segregated ballots cast by persons whose name appear on voters' list	3	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		31
Number of ballots marked in favour of intervener		10
Ballots segregated and not counted		3

Applications for Certification Dismissed Without Vote

2742-82-R: International Brotherhood of Electrical Workers Local Union 1687, (Applicant) v. Kidd Creek Mines Ltd., (Respondent) v. United Steelworkers of America, (Intervener). (111 employees in unit).

0877-84-R: Ontario Secondary School Teachers' Federation, (Applicant) v. The Halton Board of Education, (Respondent). (248 employees in unit).

0878-84-R: Ontario Secondary School Teachers' Federation, (Applicant) v. The Halton Board of Education, (Respondent). (461 employees in unit).

2508-85-R: Hotel Employees Restaurant Employees Union Local 75, (Applicant) v. 566799 Ontario Ltd. carrying on business under name and style of The Inn On The Lake, (Respondent) v. Group of Employees, (Objectors). (44 employees in unit).

3194-85-R: Service Employees International Union Local 204, (Applicant) v. Allders International (Canada) Limited, (Respondent). (93 employees in unit).

Unit #1: (See *Bargaining Agents Certified Without Vote*).

0076-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Miller Paving Limited c.o.b. as Markham Disposal, (Respondent) v. Group of Employees, (Objectors). (51 employees in unit).

0172-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Runnymede Development Corporation Limited, (Respondent). (4 employees in unit).

0223-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. B.B.M. Excavating Co. Ltd., (Respondent). (2 employees in unit).

0320-86-R: Christian Labour Association of Canada, (Applicant) v. Geri-Care Nursing Home of Caresant Care Limited, (Respondent). (71 employees in unit).

0407-86-R: International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths Forgers and Helpers Cement Division, (Applicant) v. Federal White Cement Company Ltd., (Respondent). (7 employees in unit).

0410-86-R: Ontario Catholic Occasional Teachers' Association, (Applicant) v. Halton Roman Catholic Separate School Board, (Respondent). (240 employees in unit).

0480-86-R; 0481-86-R: The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant) v. Super-Van Conversions Inc., Robertson & Dawson Ltd., (Respondents) v. Group of Employees, (Objectors). (35 employees in unit).

Unit #1: (See *Bargaining Agents Certified Without Vote*).

0517-86-R: Canadian Union of Public Employees, (Applicant) v. Walwel Villa Senior Citizens Centre, (Respondent). (11 employees in unit).

0584-86-R: Ontario Public Service Employees Union, (Applicant) v. Sacred Heart Child and Family Centre, (Respondent). (69 employees in unit).

Unit #1: (See *Bargaining Agents Certified Without Vote*).

Unit #3: (See *Bargaining Agents Certified Without Vote*).

Unit #4: (See *Bargaining Agents Certified Without Vote*).

0605-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Metropolitan Toronto Convention Centre Corporation, (Respondent). (316 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0762-84-R: Ontario Public Service Employees Union, (Applicant) v. The Board of Education for the City of Scarborough, (Respondent) v. Ontario Secondary School Teachers' Federation, (Intervener).

Unit: "all occasional teachers employed by the respondent in its secondary panel in the City of Scarborough, save and except persons covered by subsisting collective agreements." (443 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list	362
Number of persons who cast ballots	127
Number of segregated ballots cast by persons whose name appear on voters' list	125
Number of segregated ballots cast by persons whose names do not appear on voters' list	2

2361-84-R: Ontario Public Service Employees Union, (Applicant) v. The Board of Education for the City of Toronto, (Respondent) v. Ontario Secondary School Teachers' Federation, (Intervener).

Unit: "all instructors employed by the respondent in its Adult English Second Language Programme in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor." (237 employees in unit).

Number of names of persons on list as originally prepared by employer	246
Number of persons who cast ballots	91
Number of segregated ballots cast by persons whose names appear on voters' list	87
Number of segregated ballots cast by persons whose names do not appear on voters' list	4

0326-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351, (Applicant) v. Holiday Inn of Cornwall of The Commonwealth Holiday Inns of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (38 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	40
Number of persons who cast ballots	37
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	24

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1991-85-R: Labourers' International Union of North America, Local 1081, (Applicant) v. Drexler Construction Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all construction labourers in the employ of Drexler Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Drexler Construction Limited in all other sectors in the County of Wellington, (on January

22, 1986), save and except non-working foremen and persons above the rank of non-working foreman." (28 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	23	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		18
Ballots segregated and not counted		1

2786-85-R: Toronto Typographical Union No. 91, (Applicant) v. Condor Laminations, Division of Purity Packaging, Division of Innopac Inc., (Respondent) v. Group of Employees, (Objectors). (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		1

Unit #1: (See *Bargaining Agents Certified Without Vote*).

2817-85-R: Local 46, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Highland Equipment Limited, (Respondent).

Unit: "all employees of the respondent in the city of Mississauga, save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff." (20 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	19	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		13

2996-85-R: Construction Workers Local 53, affiliated with the Christian Labour Association of Canada (CLAC), (Applicant) v. Total Fire Systems, a division of 552479 Ontario Inc., (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, Sprinkler Fitters of Ontario, (Intervener).

Unit: "all sprinkler and fire protection installers (sprinkler fitters) and all sprinkler and fire protection installers (sprinkler fitters) apprentices employed by the respondent in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		2
Number of ballots marked in favour of intervener		2

3153-85-R: Energy and Chemical Workers Union, (Applicant) v. MacDonald & White Varnish & Paint Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		16
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		6
Ballots segregated and not counted		2

0138-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Emhart Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Woodstock, Ontario, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and sales staff and students employed during the school vacation period." (141 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		120
Number of persons who cast ballots	20	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		40
Number of ballots marked against applicant		79

2029-86-R: Canadian Union of Public Employees, (Applicant) v. The Great War Memorial Hospital of Perth District, (Respondent).

Unit: "all paramedical employees of the respondent in Perth, Ontario, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of April 18, 1986." (11 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		5

Applications For Certification Withdrawn

0826-84-R: Ontario Secondary School Teachers' Federation, (Applicant) v. Peel Board of Education, (Respondent).

0263-86-R: London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Women's Christian Association of London (owner and operator of Parkwood Hospital), (Respondent).

0391-86-R: The Canadian Union of Public Employees, (Applicant) v. Victoria Day Care Services, (Respondent).

0473-86-R: Christian Labour Association of Canada, (Applicant) v. Interwide Mechanical & Contracting Limited, (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Intervener).

0560-86-R: United Steelworkers of America, (Applicant) v. Atlas Alloy (Division of Rio Algom Ltd.), (Respondent).

0563-86-R: Service Employees Union Local 268, (Applicant) v. Lakehead University, (Respondent).

0655-86-R: Canadian Union of Public Employees, (Applicant) v. Centennial Manor (Bancroft, Ontario), (Respondent).

0737-86-R: International Brotherhood of Painters and Allied Workers, Local 1891, (Applicant) v. Best - Way Plastering Thunder Bay Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2883-83-R: Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, (Applicant) v. Dominion Stores Limited, Willet Foods Limited, and RPKC Holding Corporation, (Respondents). (*Granted*).

0303-85-R: Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, (Applicant) v. Mr. Grocer (Dennis O'Neil) Dominion Stores Limited, and Willett Foods Limited, c.o.b. as Mr. Grocer, (Respondents). (*Withdrawn*).

1036-85-R: Labourers' International Union of North America, Local 183, (Applicant) v. Frank Plastina Investments Ltd. and Sherwood Village Homes Inc., carrying on business under the firm name and style as Grand Valley Homes, (Respondents). (*Granted*).

1798-85-R: Retail, Commercial & Industrial Union, Local 206 chartered by the United Food & Commercial Workers International Union, (Applicant) v. The Knechtel Corp. and Dominion Stores Limited, (Respondents). (*Dismissed*).

2398-85-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Cesan Mechanical Systems Ltd., and Plumex Mechanical Ltd., (Respondents). (*Granted*).

2482-85-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Nadalin Contract Floor & Wall Coverings Limited, Jerry Nadalin and Daniel A. Nadalin carrying on business as Nadalin Floor & Wall Coverings, (Respondent). (*Granted*).

3147-85-R: Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, Local 1590, (Applicants) v. John Fraser c.o.b. as Bluewater Custom Sandblasting and Lori Gayle Fraser and K.L. McCormick Limited c.o.b. as Sarnia Sandblasting & Painting, (Respondents). (*Granted*).

SALE OF A BUSINESS

1386-83-R: RPKC Holding Corporation, (Applicant) v. Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, (Respondent) v. Dominion Stores Limited, (Intervener #1) v. Willett Foods Limited, (Intervener #2). (*Granted*).

1755-83-R: Stalba Enterprises Inc., (Applicant) v. Retail, Wholesale and Department Store Union, and its Local 414, (Respondent). (*Withdrawn*).

2883-83-R: Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, (Applicant) v. Dominion Stores Limited, Willett Foods Limited, and RPKC Holding Corporation, (Respondents). (*Granted*).

0304-85-R: Retail, Wholesale and Department Store Union, Local 414 AFL-CIO-CLC, (Applicant) v. Dominion Stores Limited, Willett Foods Limited, and Mr. Grocer (Dennis O'Neill), (Respondent). (*Withdrawn*).

1000-85-R: Labourers' International Union of North America, Local 183, (Applicant) v. Frank Plastina Investments Ltd. and Sherwood Village Homes Ind., carrying on business under the firm name and style as Grand Valley Homes, (Respondents). (*Withdrawn*).

1797-85-R: Retail, Commercial and Industrial Union, Local 206 chartered by the United Food & Commercial Workers International Union, (Applicant) v. The Knechtel Corp. and Thomas Byrne and Ronald Renning, (Respondents) v. Dominion Stores Limited, (Intervener). (*Dismissed*).

2397-85-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Cesan Mechanical Systems Ltd., and Plumex Mechanical Ltd., (Respondents). (*Dismissed*).

2494-85-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Scofan Contractors Limited, North Span Construction Inc., and Genus Corporation Ltd., (Respondents). (*Withdrawn*).

3119-85-R: International Union of Operating Engineers, Local 796, (Applicant/Complainant) v. Toronto College Street Centre Limited, (Respondent). (*Granted*).

3147-85-R: Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, Local 1590, (Applicants) v. John Fraser c.o.b. as Bluewater Custom Sandblasting and Lori Gayle Fraser and K.L. McCormick Limited c.o.b. as Sarnia Sandblasting & Painting, (Respondents). (*Granted*).

0021-86-R: International Beverage Dispensers' and Bartenders Union Local 280, (Applicant) v. The Old Victoria Hotel Ltd., (Respondent). (*Granted*).

0253-86-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ault Dairies, Division of Ault Foods Limited, (Respondent) v. Retail, Wholesale, Dairy and General Workers' Union, Local 440, (Intervener). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2594-85-R: Pinkerton's of Canada Limited, (Applicant) v. Canada Guards Association, Local 114, (Respondent). (40 employees in unit). (*Dismissed*).

2771-85-R: Gary J. Steffler, (Applicant) v. United Food & Commercial Workers, Local 206, chartered by the United Food and Commercial Workers International Union, CLC AFL-CIO, (Respondent) v. James B. & E. Morris Family Enterprise Inc., (Intervener).

Unit: "all employees employed in its stores in the City of Waterloo, save and except the Store Manager, one Grocery Manager, and one other Department Manager." (37 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		36
Number of persons who cast ballots	32	
Number of ballots marked in favour of respondent		13
Number of ballots marked against respondent		19

3116-85-R: Mary Kispal-Kovacs, (Applicant) v. Service Employees International Union, Local 204, (Respondent) v. The Runnymede Hospital, (Intervener).

Unit #1: "all registered and graduate nurses engaged in a nursing capacity, employed at The Runnymede Hospital, save and except Assistant Head Nurses, Head Nurses, Supervisors and persons above the rank of Assistant Head Nurse and persons regularly employed for not more than twenty-four (24) hours per week and persons covered by subsisting collective agreements." (23 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	22	
Number of ballots marked in favour of respondent		13
Number of ballots marked against respondent		9

Unit #2: "all registered and graduate nurses employed by the Runnymede Hospital in Metropolitan Toronto, in a nursing capacity, regularly employed for not more than twenty-four (24) hours per week, save and except Assistant Head Nurses, Head Nurses, Supervisors and persons above the rank of Assistant Head Nurse and persons covered by subsisting collective agreements." (16 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		6
Number of ballots marked against respondent		2

3212-85-R: John R. Hearn, (Applicant) v. The Built-Up Roofers, Damp & Waterproofing Section of the

Ontario Sheet Metal Workers' Conference of the Sheet Metal Workers' International Association on behalf of Local 473, (Respondent) v. Williamson Bros. Ltd., (Intervener).

Unit: "all employees performing work covered by the built-up roofers provincial agreement in the industrial, commercial and institutional sector of the construction industry on May 13, 1986." (3 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

3214-85-R: William Frederick Milligan and Michael Plumley, (Applicants) v. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC, Local 1094, (Respondent). (2 employees in unit). (*Granted*).

3215-85-R: Raymond Bussink, (Applicant) v. United Food & Commercial Workers International Union, Local 617P Hamilton Ont., (Respondent). (4 employees in unit). (*Withdrawn*).

3216-85-R: Bernard John Moore, (Applicant) v. The International Association of Machinists and Aerospace Workers (AFL-CIO-CLC) Local Lodge No. 1975, (Respondent) v. Imperial Clevite Canada Inc., (Intervener). (33 employees in unit). (*Dismissed*).

3222-85-R: Howard Woolley, (Applicant) v. Communications and Electrical Workers of Canada, (Respondent) v. Kearney - National (Canada) Limited, (Intervener). (3 employees in unit). (*Granted*).

3224-85-R: John Schell, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent). (2 employees in unit). (*Granted*).

3225-85-R: The Staff of the *Sheridan Inn*, 529486 Ontario Ltd., (Applicant) v. Retail, Wholesale and Department Store Union, Local 448, (Respondent). (15 employees in unit). (*Withdrawn*).

3226-85-R: Stephen Grummett for a group of employees, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting industry of the United States and Canada, Local Union 527, (Respondent). (16 employees in unit). (*Granted*).

0274-86-R: Joseph Turi, (Applicant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (Respondent). (25 employees in unit). (*Granted*).

0339-86-R: The employees of Koehl Industries Ltd., at Windsor, Ontario, being those employees of a bargaining unit certified by Certificate issued by the Ontario Labour Relations Board, March 29, 1985, (Applicants) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. Local 195, (Respondent). (9 employees in unit). (*Granted*).

0349-86-R: Gilbert Clement, (Applicant) v. United Steelworkers of America, (Respondent). (4 employees in unit). (*Dismissed*).

0357-86-R: Judith E. Mays and Brian Pellerin, (Applicant) v. Retail, Wholesale and Department Store Union Local 414, (Respondent) v. Robert Shuttleworth, (Intervener). (54 employees in unit). (*Dismissed*).

0588-86-R: Calorific Construction Limited, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent). (0 employees in unit). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0808-86-U: Ottawa Civic Hospital, (Applicant) v. Donna Hicks, President, Local 90 and Ontario Nurses Association, (Respondents). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0720-86-U: Duntri Construction, (Applicant) v. R. Fisher, J. Keith et al, (Respondents). (*Withdrawn*).

0767-86-U; 0768-86-U; 0769-86-U; 0770-86-U; 0771-86-U: The Ontario Sheet Metal and Air Handling Group, (Applicant) v. The Ontario Sheet Metal Workers Conference; Sheet Metal Workers International Association Local Union 539; Local Union 235; Local Union 30; Local Union 47; Len Dicker, Harry Dunlop, Stan Barry, Robert Thorpe, William Ellis, Clayton June, Ray Paterson, Arthur White and R. Belleville, (Respondents). (*Granted*).

0789-86-U: Carpenters' Employers Bargaining Agency, (Applicant) v. Local Union 675, United Brotherhood of Carpenters and Joiners of America Ken Weller, and Gus Simone, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

0545-86-U: Monarch Fine Foods Company Limited, (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, Randy Doner; Michael Reid; Arthur Morley; Ronald Debartok, Steve Sajbic and Alice Gralek, (Respondents). (*Granted*).

0784-86-U: Ontario Nurses Association, (Applicant) v. Ottawa Civic Hospital, (Respondent). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2317-82-U: United Electrical, Radio and Machine Workers of America (UE), (Complainant) v. Westinghouse Canada Inc., (Respondent). (*Dismissed*).

0322-83-U: John (Jack) James, (Complainant) v. Labourers' International Union of North America, and its Locals 493 and 527, (Respondents). v. O. J. Pipelines Ltd., (Intervener). (*Dismissed*).

0393-84-U; 2603-84-U: International Union of Elevator Constructors, Local 50, (Applicant/Complainant) v. Beckett Elevator Limited, (Respondent). (*Granted*).

0943-84-U: Schneiders Office Employees Association, (Complainant) v. J. M. Schneider Inc. and Link Services Inc., (Respondents) v. John McIntyre and David Moser, (Interveners). (*Dismissed*).

1607-84-U: Donald McConvey, (Complainant) v. United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 46, (Respondent). (*Dismissed*).

2113-84-U: United Steelworkers of America and its Local 9011, (Complainant) v. Radio Shack Division Tandy Electronics Limited, (Respondent). (*Withdrawn*).

0217-85-U: Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, (Applicant) v. Dominion Stores Limited, Willett Foods Limited, and RPKC Holding Corporation, (Respondents). (*Granted*).

0666-85-U: Norman F. Stroesser, (Complainant) v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America U.A.W., Local 444 and Chrysler Canada Limited, (Respondent). (*Dismissed*).

0762-85-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Ed Mirvish Enterprises Limited, (Respondent). (*Dismissed*).

1201-85-U: United Steelworkers of America, (Complainant) v. Converter Man Limited, (Respondent). (*Granted*).

1237-85-U: Jeanne St. Pierre, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. Local 444 and Chrysler Canada Ltd., (Respondents). (*Granted*).

1340-85-U: Hotel Employees Restaurant Union, Local 75, (Complainant) v. Ed Mirvish Enterprises Limited c.o.b. as Ed's Chinese Restaurant, Ed's Italian Restaurant, Ed's Seafood Restaurant, Ed's Warehouse Restaurant, Old Ed's and Ed's Folly, (Respondent). (*Dismissed*).

1717-85-U: Canadian Paperworkers' Union, (Complainant) v. W. H. Smith Canada Ltd., (Respondent). (*Granted*).

2055-85-U: Bruce Dunlop, (Complainant) v. Local 444, U.A.W., (Respondent) v. Chrysler Canada Ltd., (Intervener). (*Dismissed*).

2349-85-U; 2699-85-U; 0136-86-U; 0244-86-U; 0260-86-U: United Steelworkers of America, (Complainant) v. ABC Plastic Moulding, (Respondent). (*Granted*).

2522-85-U: Lesley A. Brock, (Complainant) v. Brucefield Manor Nursing Home, (Respondent) v. Christian Labour Association of Canada, (Intervener). (*Withdrawn*).

2528-85-U: Brian Sears, (Complainant) v. United Steelworkers of America, Local 5475, (Respondent) v. Dresser Canada Inc., (Intervener). (*Dismissed*).

2529-85-U: Bruno Basic, (Complainant) v. United Steelworkers of America, Local 5475, (Respondent) v. Dresser Canada Inc., (Intervener). (*Dismissed*).

2530-85-U: Nicholas Krsmanovich, (Complainant) v. United Steelworkers of America, Local 5475, (Respondent) v. Dresser Canada Inc., (Intervener). (*Dismissed*).

2795-85-U: Paul Sapusak, (Complainant) v. Hotel, Restaurant and Cafeteria Employees Union Local #75, (Respondent) v. Chateau Flight Kitchen, CP Hotels, A Division of Canadian Pacific Air Lines, Limited, (Intervener). (*Withdrawn*).

2823-85-U: Aluminium Brick and Glass Workers International Union AFL-CIO-CLC and its Local 295G, (Complainant) v. Ford Glass Limited, (Respondent). (*Granted*).

2899-85-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Complainant) v. Highland Equipment Limited, (Respondent). (*Withdrawn*).

2922-85-U: Canadian Union of Public Employees, (Complainant) v. Children's Castle Day Care Limited, (Respondent). (*Withdrawn*).

2923-85-U: Canadian Union of Public Employees, (Complainant) v. Children's Castle Day Care Limited, (Respondent). (*Withdrawn*).

2967-85-U: Retail, Wholesale & Department Store Union AFL-CIO-CLC, (Complainant) v. T. Eaton Company Limited, (Respondent). (*Withdrawn*).

3032-85-U: Arthur H. Palanuk, (Complainant) v. United Steelworkers of America - Local Union 2251, (Respondent). (*Withdrawn*).

3050-85-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Gould Paper Products Ltd., (Respondent). (*Withdrawn*).

3120-85-U: International Union of Operating Engineers, Local 796, (Applicant/Complainant) v. Toronto College Street Centre Limited, (Respondent). (*Dismissed*).

3136-85-U: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers, (Complainant) v. Walpat Glass & Aluminum Products Ltd., (Respondent). (*Granted*).

3165-85-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. The Inn on the Lake, (Respondent). (*Withdrawn*).

3189-85-U: Labourers' International Union of North America, Local 1059, (Applicant/Complainant) v. Tonda Construction Limited, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

3192-85-U: George Vlahos, (Complainant) v. Toronto Motion Pictures Projectionists, Local 173, the International Alliance Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and Graydon Hulse, (Respondents). (*Withdrawn*).

0011-86-U: United Steelworkers of America, (Complainant) v. C. H. Heist (Canada) Limited, (Respondent). (*Granted*).

0020-86-U: International Beverage Dispensers' and Bartenders Union Local 289, (Complainant) v. The Old Victoria Hotel Limited, (Respondent). (*Granted*).

0033-86-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. Dutch Laundry and Dry Cleaners Limited c.o.b. as Forest City Linen Supply, (Respondent). (*Withdrawn*).

0038-86-U: Amalgamated Clothing and Textile Workers' Union, (Complainant) v. Clairville Carpet Mills, A Division of Gesco Industries Inc., (Respondent). (*Withdrawn*).

0048-86-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Complainant) v. Simcoe Block (1979) Limited, (Respondent). (*Withdrawn*).

0055-86-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Complainant) v. J. Ward Mechanical Ltd., (Respondent). (*Withdrawn*).

0087-86-U: Marc Lefebvre and Jocelyn Lefebvre, (Complainant) v. International Brotherhood of Painters and Allied Trades and Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891, (Respondent). (*Granted*).

0155-86-U: Communications, Electronic, Electrical, Technical & Salaried Workers of Canada, Local 557, (Complainant) v. Gray Forgings & Stampings Limited, (Respondent). (*Withdrawn*).

0165-86-U: Service Employees International Union, Local 204, (Complainant) v. Allders International Canada Ltd., (Respondent). (*Withdrawn*).

0166-86-U: Amalgamated Clothing and Textile Workers' Union, (Complainant) v. Clairville Carpet Mills, A Division of Gesco Industries Inc., (Respondent). (*Withdrawn*).

0185-86-U: Ontario Nurses' Association, (Complainant) v. Muskoka Parry Sound Health Unit, (Respondent). (*Withdrawn*).

0199-86-U: United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Complainant) v. Designer Classics Carpet Manufacturing Limited, (Respondent). (*Withdrawn*).

0379-86-U: Toronto Typographical Union No. 91, (Complainant) v. Condor Laminations, (Respondent). (*Withdrawn*).

- 0402-86-U:** Edward George Pokonzie, (Complainant) v. Victoria Transport Inc. & Teamsters Local 879, (Respondent). (*Withdrawn*).
- 0412-86-U:** Tom Hosking, (Complainant) v. Energy & Chemical Workers Union (Local 41), (Respondent). (*Withdrawn*).
- 0414-86-U:** Bakery, Confectionery and Tobacco Workers International Union, Local 264, (Complainant) v. Dimpflemeier Bakery Ltd., (Respondent). (*Withdrawn*).
- 0415-86-U:** Alfred Cachia, (Complainant) v. Toronto Transit Commission, (Respondent). (*Dismissed*).
- 0420-86-U:** Hotels, Clubs, Restaurants & Taverns Employees' Union, (Complainant) v. Margaret Dunn and 447963 Ontario Ltd., (Respondent). (*Withdrawn*).
- 0421-86-U:** Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261, (Complainant) v. Pauline Webb and 547691 Ontario Ltd., (cob Journey's End Motel), (Respondent). (*Withdrawn*).
- 0423-86-U:** The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainant) v. Adams & Kennedy Co. Ltd., (Respondent). (*Withdrawn*).
- 0436-86-U:** United Food & Commercial Workers International Union, (Complainant) v. Windsor Wafers, (Respondent). (*Withdrawn*).
- 0440-86-U:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Beta Taxi Ltd. c.o.b. My-Way Taxi Rental & Services Limited, (Respondent). (*Granted*).
- 0466-86-U:** Health, Office & Professional Employees, a division of Local 206, United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Picton Manor Nursing Home, (Respondent). (*Withdrawn*).
- 0467-86-U:** Health, Office & Professional Employees, a division of Local 206, United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Kentwood Nursing Home, (Respondent). (*Withdrawn*).
- 0468-86-U:** Health, Office & Professional Employees, a division of Local 206, United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Westlake Nursing Home, (Respondent). (*Withdrawn*).
- 0476-86-U:** Toronto Typographical Union No. 91, (Complainants) v. Condor Laminations, (Respondent). (*Withdrawn*).
- 0501-86-U:** Canadian Union of Public Employees, (Complainant) v. Residence St. Francois, (Respondent). (*Withdrawn*).
- 0502-86-U:** Canadian Union of Public Employees, (Complainant) v. The Town of Wasaga Beach, (Respondent). (*Withdrawn*).
- 0505-86-U:** Victory Soya Mills Ltd., (Complainant) v. Teamster's Chemical, Energy and Chemical Workers' Union and its Local 1247, (Respondent). (*Withdrawn*).
- 0508-86-U:** Energy & Chemical Workers Union, (Complainant) v. Druggist Corporation Limited, (Respondent). (*Withdrawn*).
- 0540-86-U:** Canadian Union of Public Employees, (Complainant) v. Creedan Valley Nursing Home Ltd., (Respondent). (*Withdrawn*).

0549-86-U: Canadian Union of Public Employees and its Local 3043, (Complainant) v. Women's College Hospital, (Respondent). (*Withdrawn*).

0602-86-U: Gerrard Kilby, (Complainant) v. Ken Lane; Committee Chairman, Genaire Unit of UAW Local 199, (Respondent). (*Withdrawn*).

0613-86-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Complainant) v. G. A. Kelson Company Ltd., (Respondent). (*Withdrawn*).

0765-86-U: Denis Ferdinand Black, (Complainant) v. Retail, Wholesale and Department Store Union, Local 414 AFL-CIO-CLC, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

3188-85-U: Labourers' International Union of North America, Local 1059, (Applicant/Complainant) v. Tonda Construction Limited, (Respondent). (*Dismissed*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

3021-85-M: Anne Hill, (Applicant) v. Ontario Public Service Employees Union, (Respondent Trade Union) v. Children's Aid Society of the Regional Municipality of Waterloo, (Respondent Employer). (*Granted*).

3022-85-M: Barbara Van Norman, (Applicant) v. Ontario Public Service Employees Union, (Respondent Trade Union) v. Children's Aid Society of the Regional Municipality of Waterloo, (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0371-86-M: Insulgard Pad (512825 Ontario Inc.), (Employer) v. International Union of Allied, Novelty and Production Workers, Local 905, (Trade Union). (*Granted*).

FINANCIAL STATEMENT

0002-84-M: Reginald Robert, (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local 800, (Respondent). (*Dismissed*).

JURISDICTIONAL DISPUTES

0230-86-JD: International Beverage Dispensers' and Bartenders Union, Local 280, (Complainant) v. Nag's Head Tavern (Eaton Centre) Hotel Employees Restaurant Employees Union - Local 75, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1867-84-M: Ontario Nurses' Association, (Applicant) v. St. Joseph's Hospital, (Respondent). (*Granted*).

3299-84-M: CUPE - CLC, Ontario Hydro Employees Union, Local 1000, (Applicant) v. Ontario Hydro (Bancroft Area), (Respondent). (*Granted*).

3337-84-M: Algoma District Homes for the Aged (F. J. Davey Home for the Aged), (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

0389-85-M: Corporation of the County of Renfrew - Bonnechere Manor, (Employer) v. Ontario Nurses' Association, Local 174, (Trade Union). (*Dismissed*).

0948-85-M: The Freeport Hospital, (Applicant) v. Ontario Nurses Association, (Respondent) v. Group of Employees (Unit Managers), (Intervener #1) v. Group of Employees (Asst. Managers Patient Care), (Intervener #2). (*Dismissed*).

2678-85-M: Hawkesbury and District General Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*).

2778-85-M: The Corporation of the City of Oshawa, (Applicant) v. Canadian Union of Public Employees Local 251, (Respondent). (*Dismissed*).

2909-85-M: Ontario Nurses' Association, (Applicant) v. Hamilton Civic Hospitals, (Respondent). (*Withdrawn*).

3210-85-M: Office and Professional Employees International Union, Local 225, (Applicant) v. Union du Canada Assurance-Vie, (Respondent). (*Withdrawn*).

3211-85-M: Ontario Nurses Association, (Applicant) v. St. Vincent Hospital, (Respondent). (*Withdrawn*).

3229-85-M: Cement, Lime, Gypsum & Allied Workers Division Boilermakers Local Division 576, (Applicant) v. Hamilton Automatic Vending Company, (Respondent). (*Dismissed*).

0293-86-M: C.U.P.E., Local 1033, (Applicant) v. St. Joseph's Hospital, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

2445-84-OH: Ken Evraire, (Complainant) v. The Corporation of the City of Ottawa, (Respondent). (*Granted*).

1378-85-OH: Rai N. Patel, (Complainant) v. Dutch Laundry and Dry Cleaners Limited, carrying on business as Forest City Linen Supply, (Respondent). (*Granted*).

1404-85-OH: Dennis Quinn, John Cucullo, (Complainants) v. Buttermilk Ski Hill, (Respondent). (*Granted*).

1888-85-OH: Frank J. Marasco, (Complainant) v. Ralph Elsignan, (Respondent). (*Granted*).

1926-85-OH: John T. Vonk, (Complainant) v. Corporation of the City of Scarborough, (Respondent). (*Dismissed*).

1927-85-OH: Scarborough Professional Fire Fighters Assoc. Loc. 626, (Complainant) v. Corporation of the City of Scarborough, (Respondent). (*Dismissed*).

3200-85-OH: Mr. Beverley Burtch and the United Brotherhood of Carpenters & Joiners of America Local Union 3054, (Complainants) v. General Coach, A Division of Citair, Inc., Andrew Imanse, P. C. Malik, Bill McNutt, and Jack Snell, (Respondents). (*Withdrawn*).

0404-86-OH: Garry Timmins, (Complainant) v. Inco Ltd., Don Cameron and D. Liechti, (Respondents). (*Withdrawn*).

0567-86-OH: Terence Kolburn, (Complainant) v. The Corporation of the City of London, Fire Department, (Respondent). (*Withdrawn*).

0612-86-OH: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry

of the United States and Canada, Local Union 46, (Complainant) v. G. A. Kelson Company Ltd., (Respondent). (*Withdrawn*).

0724-86-OH: Terry Steven Lacelle, (Complainant) v. Rudy Zaner, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

0204-84-M; 0205-84-M; 2602-84-M: International Union of Elevator Constructors, Local 50, (Applicant/Complainant) v. Beckett Elevator Limited, (Respondent). (*Granted*).

0259-85-M: Mechanical Contractors Association of Ontario, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, (Respondent). (*Dismissed*).

2399-85-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Cesan Mechanical Systems Ltd., and Plumex Mechanical Ltd., (Respondents). (*Withdrawn*).

2492-85-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Nadalin Contract Floor & Wall Coverings Limited, Jerry Nadalin and Daniel A. Nadalin carrying on business as Nadalin Floor & Wall Coverings, (Respondent). (*Granted*).

2492-85-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Newman Bros. Co. Ltd., (Respondent). (*Withdrawn*).

2526-85-M: Ontario Allied Construction Trades Council and L.I.U.N.A., Local 597, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro-Darlington G.S., (Respondent). (*Withdrawn*).

2606-85-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Amar Mechanical Systems Limited, (Respondent). (*Withdrawn*).

2627-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. Star-Wall Concrete Forming Ltd., (Respondent). (*Granted*).

2743-85-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Highrock Structural Ltd., (Respondent). (*Withdrawn*).

3196-85-M: Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 539, (Applicants) v. Imperial Insulation & Roofing (1982) Limited, (Respondent). (*Withdrawn*).

0299-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. The Metropolitan Toronto Apartment Builders Association and Mirlyn Developments, (Respondents). (*Withdrawn*).

0366-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. L. Trenching Limited, (Respondent). (*Withdrawn*).

0394-86-M: Ontario Allied Construction Trades Council and Labourers' International Union of North America, Local 597, (Applicant) v. Devon Structures Limited, Devon Structural Limited, and Devon Construction Limited, (Respondents). (*Withdrawn*).

0395-86-M: Labourers' International Union of North America, Local 1089, (Applicant) v. M. Alzner Contractors Limited, (Respondent). (*Granted*).

0435-86-M: Ontario Council of the International Brotherhood of Painters and Allied Trades and International

Brotherhood of Painters and Allied Trades, Local 1590, (Applicants) v. John Fraser c.o.b. as Bluewater Custom Sandblasting and Lori Gayle Fraser and K.L. McCormick Limited c.o.b. as Sarnia Sandblasting & Painting, (Respondents). (*Granted*).

0443-86-M: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Mega Concrete Forms Limited, (Respondent). (*Granted*).

0448-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Primarco Carpentry, (Respondent). (*Withdrawn*).

0449-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Status Framing Inc., (Respondent). (*Withdrawn*).

0450-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Carwood Store Fixtures Ltd., (Respondent). (*Granted*).

0451-86-M: United Brotherhood of Carpenters' and Joiners of America, Local 785, (Applicant) v. Losereit Sales and Services Ltd., (Respondent). (*Granted*).

0453-86-M: United Brotherhood of Carpenters' and Joiners of America, Local 785, (Applicant) v. Collavino Inc., (Respondent). (*Granted*).

0456-86-M: United Brotherhood of Carpenters' and Joiners of America, Local 785, (Applicant) v. Arjeco Industries Ltd., (Respondent). (*Granted*).

0482-86-M: Local Union 93, United Brotherhood of Carpenters and Joiners of America and Marc Carriere, (Applicants) v. Macdonald's Flooring Installations Ltd., (Respondent). (*Granted*).

0518-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Rabito Sewer and Watermain Contractors Ltd., (Respondent). (*Withdrawn*).

0520-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Pachino Construction Co. Ltd., (Respondent). (*Withdrawn*).

0521-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Maple Leaf Paving & Constr. Ltd., (Respondent). (*Withdrawn*).

0522-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. D. & R. Ventura Construction Limited, (Respondent). (*Withdrawn*).

0523-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Concord Concrete and Drain Inc., (Respondent). (*Withdrawn*).

0526-86-M: United Brotherhood of Carpenters' and Joiners of America, Local 785, (Applicant) v. Tipico Drywall and Construction Limited c/o Rotondo and Associates, (Respondent). (*Withdrawn*).

0527-86-M: United Brotherhood of Carpenters' and Joiners of America, Local 785, (Applicant) v. PCL Constructors Eastern Inc., (Respondent). (*Withdrawn*).

0536-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. A. Valente Const. Co. Ltd., (Respondent). (*Withdrawn*).

0537-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Starcon Concrete & Drain Inc., (Respondent). (*Withdrawn*).

0538-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Carwell Construction Limited, (Respondent). (*Withdrawn*).

0539-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Central Peel Holdings (1982) Ltd. Operating as Darcel Developers Ltd., (Respondent). (*Withdrawn*).

0554-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Amar Mechanical Systems Ltd., (Respondent). (*Withdrawn*).

0579-86-M: International Brotherhood of Painters and Allied Trades, Local 205 and the Ontario Council of The International Brotherhood of Painters and Allied Trades, (Applicant) v. Roland Geib and Renzo Diccio c.o.b. as Renzo & Geib Painting & Decorating, (Respondent). (*Granted*).

0582-86-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen, Local 23, (Applicant) v. Fred Jantz Masonry Construction Company Limited, (Respondent). (*Dismissed*).

0586-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. John Maggio Excavating Ltd., (Respondent). (*Granted*).

0610-86-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Roch Cayer, (Respondent). (*Withdrawn*).

0611-86-M: United Brotherhood of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Complainant) v. G. A. Kelson Company Ltd., (Respondent). (*Withdrawn*).

0614-86-M: Labourers' International Union of North America, Local 837, (Applicant) v. Smith Brothers' Contracting Limited, (Respondent). (*Withdrawn*).

0627-86-M: Labourers' International Union of North America, Local 837, (Applicant) v. Skeates Plastering (Burlington) Ltd., (Respondent). (*Withdrawn*).

0642-86-M: Sheet Metal Workers International Association, Local Union 30, (Applicant) v. Margven Roofing Limited, (Respondent). (*Withdrawn*).

0643-86-M: Sheet Metal Workers International Association, Local Union 30, (Applicant) v. Snedden-Wakefield Limited, (Respondent). (*Withdrawn*).

0644-86-M: Sheet Metal Workers International Association, Local Union 30, (Applicant) v. Allcraft Sheet Metal Co. Limited, (Respondent). (*Withdrawn*).

0646-86-M: The International Union of Bricklayers and Allied Craftsmen Local #10, (Applicant) v. T. Filipowich Masonry Contractors Ltd., (Respondent). (*Withdrawn*).

0649-86-M: District Council 46 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Roncali Brothers Limited, (Respondent). (*Granted*).

0661-86-M: Labourers' International Union of North America, Local 1059, (Applicant) v. J-aar Excavating Limited, (Respondent). (*Withdrawn*).

0662-86-M: Sheet Metal Workers' International Association Local 562, (Applicant) v. Thackeray Roofing and Sheet Metal Company Limited, (Respondent). (*Withdrawn*).

0696-86-M: Resilient Floorworkers Local Union 2965, (Applicant) v. Calligaro Tile Co., (Respondent). (*Granted*).

0702-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. The Second Cup, (Respondent). (*Withdrawn*).

0704-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Status Framing Inc., (Respondent). (*Withdrawn*).

0705-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Primarco Carpentry, (Respondent). (*Withdrawn*).

0706-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Toddbrook Carpentry Ltd., (Respondent). (*Withdrawn*).

0707-86-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. National Drywall Ltd., (Respondent). (*Withdrawn*).

0709-86-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Belmont Plastering, (Respondent). (*Withdrawn*).

0719-86-M: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Linrin Forming Ltd., (Respondent). (*Withdrawn*).

0777-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Pachino Construction Co. Ltd., (Respondent). (*Withdrawn*).

0779-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. L.J.S. Construction Limited, (Respondent). (*Withdrawn*).

0780-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lednier Construction Co., (Respondent). (*Withdrawn*).

0782-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Unidrain Construction Ltd., (Respondent). (*Withdrawn*).

0803-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Tony Dimonte Drainage Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1223-84-R; 1457-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Miracle Feeds, a division of Ogilvie Mills Ltd., Idealease (London) Ltd., and 571591 Ontario Inc., (Respondents). (*Denied*).

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August 1986



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**A Monthly Series of Decisions from the
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CASES REPORTED

1. Aurora Resthaven Extended Care & Convalescent Centre, Ceby Management Limited operating as; Re C.L.A.C.; Re Group of Employees.....	1031
2. Belkin Inc.; Re Canadian Paperworkers Union	1050
3. Cara Operations Limited and Hotel Employees, Restaurant Employees Union, Local 75 of the Hotel Employees, Restaurant Employees International Union A.F.L.-C.I.O. C.L.C. O.F.L.; Re Employees of Cara Operations Limited Flight Kitchens #1 and #2 Malton	1054
4. D'Alessandro, Luciano and Donato Marinaro; Re Labourers' International Union of North America, Local 1089 and Rocco D'Andrea	1058
5. Duran, Unal; Re Ontario Hydro Employees Union, C.U.P.E. Local 1000; Re Ontario Hydro	1068
6. Egan Visual Inc.; Re Daniel Bowyer; Re United Brotherhood of Carpenters and Joiners of America, Local 2679	1071
7. Egan Visual Inc.; Re Daniel Bowyer; Re United Brotherhood of Carpenters and Joiners of America, Local 2679	1075
8. Ellis-Don Limited; Re International Union of Bricklayers and Allied Craftsmen & Local Union 7 Canada	1076
9. Fairbank Carpentry and E & R Carpentry Inc., Attica Investments Incorp. c.o.b. as; Re United Brotherhood of Carpenters and Joiners of America, Local 27.....	1077
10. Fred Jantz Masonry Construction Company Limited; Re Michael C. Szabo et al.; Re Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen, Local 23	1083
11. Gruyich Services Inc., a Limited Partnership and 656508 Ontario Limited; Re Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Re Group of Employees	1092
12. International Union of Operating Engineers, Local 793; Re Alan Gagnon	1097
13. Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto, Frank Michelucci, et al.; Re Sean O'Ryan, U.A., Local 46, Mechanical Plumbing Contractors Association, Urban Mechanical Contractors Limited, Zentil Plumbing and Heating Co. Ltd., et al.	1104
14. M. Sullivan and Son; Re Labourers' Union, Local 247.....	1110
15. National Trust; Re Union of Bank Employees (Ontario), Local 2104, C.L.C.; Re Group of Employees	1115
16. Omstead Foods Limited; Re Roger Simpson; Re Teamsters, Chauffeurs, Warehousemen and Helpers Union No. 880	1120
17. Ontario Hydro, Electrical Power Systems Construction Association; Re Labourers' Union, Local 1059	1137
18. Rexwood Products Limited; Re Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America.....	1139

19.	R.L.D. Electric, 618830 Ontario Ltd. c.o.b. as; Re Peter Kunkel; Re I.B.E.W., Local 353	1145
20.	Robinson, Robert; Re Toronto Printing Pressman and Assistants' Union No. 10; Re Ronalds Printing, Richmond Hill	1151
21.	Sears Canada Inc.; Re Employees of Sears Canada Inc. (Peterborough); Re Retail, Wholesale & Department Store Union.....	1159
22.	Walter Tool and Die Ltd.; Re United Steelworkers of America; Re Erwin Walter	1167

SUBJECT INDEX

- Arbitration - Employee Reference - Practice and Procedure - Witness - Whether individual an "employee" - Board not deferring to arbitration - Whether witness entitled during cross-examination to discuss with own counsel whether specific questions must be answered - Applicability of Rules of Professional Conduct and *Statutory Powers Procedure Act*
- REXWOOD PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1139
- Bargaining Unit - Construction Industry - Termination - No collective agreement covering non-ICI projects and no work performed by employees in ICI sector - Whether applicants can seek termination of bargaining rights for both the ICI and non-ICI sectors - Whether employees working in only one unit can terminate bargaining rights in other one - Effect of statutory scheme imposing province-wide bargaining in ICI sector
- FRED JANTZ MASONRY CONSTRUCTION COMPANY LIMITED; RE MICHAEL C. SZABO ET AL.; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN AND THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 23..... 1083
- Bargaining Unit - Whether bargaining unit should be confined to a particular division of the employer - Board's practice in placing geographic limitations on the appropriate bargaining unit
- BELKIN INC.; RE CANADIAN PAPERWORKERS UNION 1050
- Certification - Construction Industry - Employer - Subcontractor on project going bankrupt - General contractor paying subcontractor's employees in order to complete project - Subcontractor continuing to control project - General contractor becoming employer for purposes of certification application
- ELLIS-DON LIMITED; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN & LOCAL UNION 7 CANADA 1076
- Certification - Practice and Procedure - Representation Vote - Request by applicant that name be amended on certification application from Textile Workers to Laundry and Linen Workers - Request granted but representation vote ordered despite fact that membership evidence over fifty-five percent - Board canvassing instances when discretion exercised under s.7(2) to order vote
- GRUYICH SERVICES INC., A LIMITED PARTNERSHIP AND 656508 ONTARIO LIMITED; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE GROUP OF EMPLOYEES..... 1092
- Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practices - Staff reduction "experiment" imposed by employer - Staff meetings held to explain effects of unionization - Respondent going beyond freedom of expression reserved to employer - Staff reductions linked to unionization - Union certified under s.8
- AURORA RESTHAVEN EXTENDED CARE & CONVALESCENT CENTRE, CEBY MANAGEMENT LIMITED OPERATING AS; RE C.L.A.C.; RE GROUP OF EMPLOYEES 1031

II

<p>Charter of Rights and Freedoms - First Contract Arbitration - Representation Vote - Termination - Application for declaration terminating bargaining rights and direction of settlement of first collective agreement by arbitration - Whether section 40a restricts freedom to contract - Whether section 7 of the Charter contravened - Whether time limits for termination appli- cations restrict freedom of association - Parties agreeing to representation vote</p> <p>EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679</p>	1075
<p>Collective Agreement - Termination - Timeliness - Collective agreement ratified but not signed formally by union due to discovery of typographical errors - Whether collective agreement in existence to bar termination application</p> <p>SEARS CANADA INC.; RE EMPLOYEES OF SEARS CANADA INC. (PETERBOR- OUGH); RE RETAIL, WHOLESALE & DEPARTMENT STORE UNION</p>	1159
<p>Construction Industry - Bargaining Unit - Termination - No collective agreement covering non- ICI projects and no work performed by employees in ICI sector - Whether applicants can seek termination of bargaining rights for both the ICI and non-ICI sectors - Whether employees working in only one unit can terminate bargaining rights in other one - Effect of statutory scheme imposing province-wide bargaining in ICI sector</p> <p>FRED JANTZ MASONRY CONSTRUCTION COMPANY LIMITED; RE MICHAEL C. SZABO ET AL.; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTER- NATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN AND THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 23.....</p>	1083
<p>Construction Industry - Certification - Employer - Subcontractor on project going bankrupt - General contractor paying subcontractor's employees in order to complete project - Sub- contractor continuing to control project - General contractor becoming employer for pur- poses of certification application</p> <p>ELLIS-DON LIMITED; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN & LOCAL UNION 7 CANADA</p>	1076
<p>Construction Industry - Termination - Timeliness - Conflict between construction industry and general termination provisions - Whether time limits relating to conciliation and one year shelter period applicable to construction industry - Sections 57 and 61 modified by six- month period in section 123</p> <p>INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE ALAN GAGNON</p>	1097
<p>Construction Industry Grievance - Parties - Whether Local can bring grievance under s.124 when collective agreement between EPSCA and Allied Council - Distinction between being bound by a collective agreement and being a party to a collective agreement discussed</p> <p>ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCI- ATION; RE LABOURERS' UNION, LOCAL 1059.....</p>	1137
<p>Construction Industry Grievance - Practice and Procedure - Applicant union closing case in chief without calling evidence - Respondent making motion for nonsuit for failure to prove unemployed members available to perform improperly subcontracted work - Motion denied - Missing element only relevant to remedy and remedy yet to be considered by Board</p> <p>FAIRBANK CARPENTRY AND E & R CARPENTRY INC., ATTICA INVEST- MENTS INCORP. C.O.B. AS; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27.....</p>	1077
<p>Construction Industry Grievance - Whether provisions of province-wide collective agreement</p>	

apply to specific area of province - Whether master agreement applies when no local schedule mandatorily applies - Where language in collective agreement permits, geographic jurisdiction assigned to individual locals corresponding to jurisdiction local enjoyed prior to province-wide bargaining - Extrinsic evidence admissible re actual jurisdiction

M. SULLIVAN AND SON; RE LABOURERS' UNION, LOCAL 247 1110

Damages - Duty of Fair Referral - Unfair Labour Practice - Whether formula in *Portiss* to be used to quantify damages flowing from s.69 breach - Complainants would have fared better than average union member but for s.69 breach - *Portiss* formula modified to reflect circumstances of case

D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1089 AND ROCCO D'ANDREA 1058

Duty of Fair Referral - Damages - Unfair Labour Practice - Whether formula in *Portiss* to be used to quantify damages flowing from s.69 breach - Complainants would have fared better than average union member but for s.69 breach - *Portiss* formula modified to reflect circumstances of case

D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1089 AND ROCCO D'ANDREA 1058

Duty of Fair Representation - Evidence - Unfair Labour Practice - Union not referring discharge grievance to arbitration - Union not calling any evidence at hearing - Employee's discharge grievance so lacking in merit that no explanation of its decision not to go to arbitration required of the union - Onus of proof in s.68 complaint discussed

ROBINSON, ROBERT; RE TORONTO PRINTING PRESSMAN AND ASSISTANTS' UNION NO. 10; RE RONALDS PRINTING, RICHMOND HILL 1151

Duty of Fair Representation - Ratification and Strike Votes - Unfair Labour Practice - Employer soliciting employees to ratify memorandum of settlement - Union acquiescence in employer's conduct - Whether collusion - Whether ratification vote conducted fairly - Whether prima facie case - Board commenting on potential consequence of remedy sought to set aside collective agreement and direct new ratification vote

CARA OPERATIONS LIMITED AND HOTEL EMPLOYEES, RESTAURANT EMPLOYEES UNION, LOCAL 75 OF THE HOTEL EMPLOYEES, RESTAURANT EMPLOYEES INTERNATIONAL UNION A.F.L.-C.I.O. C.L.C. O.F.L.; RE EMPLOYEES OF CARA OPERATIONS LIMITED FLIGHT KITCHENS #1 AND #2 MALTON 1054

Duty of Fair Representation - Settlement - Unfair Labour Practice - Terminated employee reinstated prior to arbitration through settlement - Settlement waived right of employee to grieve final termination - Whether employee estopped from raising legality or reasonableness of settlement - Board finding that settlement itself not illegal or unreasonable so as to constitute arbitrary, discriminatory or bad faith conduct on part of union

DURAN, UNAL; RE ONTARIO HYDRO EMPLOYEES UNION, C.U.P.E. LOCAL 1000; RE ONTARIO HYDRO 1068

Employee Reference - Arbitration - Practice and Procedure - Witness - Whether individual an "employee" - Board not deferring to arbitration - Whether witness entitled during cross-ex-

IV

- amination to discuss with own counsel whether specific questions must be answered - Applicability of Rules of Professional Conduct and *Statutory Powers Procedure Act*
- REXWOOD PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1139
- Employer - Certification - Construction Industry - Subcontractor on project going bankrupt - General contractor paying subcontractor's employees in order to complete project - Subcontractor continuing to control project - General contractor becoming employer for purposes of certification application
- ELLIS-DON LIMITED; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN & LOCAL UNION 7 CANADA 1076
- Evidence - Duty of Fair Representation - Unfair Labour Practice - Union not referring discharge grievance to arbitration - Union not calling any evidence at hearing - Employee's discharge grievance so lacking in merit that no explanation of its decision not to go to arbitration required of the union - Onus of proof in s.68 complaint discussed
- ROBINSON, ROBERT; RE TORONTO PRINTING PRESSMAN AND ASSISTANTS' UNION NO. 10; RE RONALDS PRINTING, RICHMOND HILL 1151
- First Contract Arbitration - Charter of Rights and Freedoms - Representation Vote - Termination - Application for declaration terminating bargaining rights and direction of settlement of first collective agreement by arbitration - Whether section 40a restricts freedom to contract - Whether section 7 of the Charter contravened - Whether time limits for termination applications restrict freedom of association - Parties agreeing to representation vote
- EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679 1075
- First Contract Arbitration - Termination - Termination application filed prior to s.40a becoming law - Whether s.40 to be interpreted so as to deprive employees of pre-existing legal rights - Whether union's failure to file reply fatal to challenge of termination application - Board hearing all evidence relating to both termination and first contract applications before deciding which to grant
- EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679 1071
- Interference in Trade Unions - Certification Where Act Contravened - Unfair Labour Practice - Staff reduction "experiment" imposed by employer - Staff meetings held to explain effects of unionization - Respondent going beyond freedom of expression reserved to employer - Staff reductions linked to unionization - Union certified under s.8
- AURORA RESTHAVEN EXTENDED CARE & CONVALESCENT CENTRE, CEBY MANAGEMENT LIMITED OPERATING AS; RE C.L.A.C.; RE GROUP OF EMPLOYEES 1031
- Membership Evidence - Allegation of non-pay dismissed where employee intended to pay back loan - Initial solicitation procedure involving drop-off of blank membership cards to be filled and mailed in by employees - First certification application withdrawn but refiled on same day - Fresh cards signed and collected by organizers - Whether membership evidence accepted as regular
- NATIONAL TRUST; RE UNION OF BANK EMPLOYEES (ONTARIO), LOCAL 2104, C.L.C.; RE GROUP OF EMPLOYEES 1115
- Natural Justice - Practice and Procedure - Board member executive director of council that co-ordinates bargaining in the ICI sector of the construction industry - Propriety of co-ordinated

collective bargaining as it affects bargaining in residential sector of construction industry
significant issue in case - Whether Board member should be removed from panel - Whether
reasonable apprehension of bias

METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION,
A DIVISION OF THE MECHANICAL CONTRACTORS ASSOCIATION TORONTO,
FRANK MICHELUCCI, ET AL.; RE SEAN O'RYAN, U.A., LOCAL 46, MECHANICAL
PLUMBING CONTRACTORS ASSOCIATION, URBAN MECHANICAL CON-
TRACTORS LIMITED, ZENTIL PLUMBING AND HEATING CO. LTD., ET AL.....

1104

Parties - Construction Industry Grievance - Whether local can bring grievance under s.124 when
collective agreement between EPSCA and Allied Council - Distinction between being
bound by a collective agreement and being a party to a collective agreement discussed

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCI-
ATION; RE LABOURERS' UNION, LOCAL 1059.....

1137

Parties - Unfair Labour Practice - Plant shutdown following filing of certification application -
Employees laid off following certification - Statement to employees threatening shutdown -
Breach of sections 64, 66 and 70 found - Order made against both company and president
and sole shareholder personally

WALTER TOOL AND DIE LTD.; RE UNITED STEELWORKERS OF AMERICA;
RE ERWIN WALTER

1167

Practice and Procedure - Arbitration - Employee Reference - Witness - Whether individual an
"employee" - Board not deferring to arbitration - Whether witness entitled during cross-ex-
amination to discuss with own counsel whether specific questions must be answered - Appli-
cability of Rules of Professional Conduct and *Statutory Powers Procedure Act* 1139

REXWOOD PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS'
UNION, LOCAL 2995 OF THE UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA

1139

Practice and Procedure - Certification - Representation Vote - Request by applicant that name be
amended on certification application from Textile Workers to Laundry and Linen Workers
- Request granted but representation vote ordered despite fact that membership evidence
over fifty-five percent - Board canvassing instances when discretion exercised under s.7(2)
to order vote

GRUYICH SERVICES INC., A LIMITED PARTNERSHIP AND 656508 ONTARIO
LIMITED; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS
UNION, LOCAL 847 AFFILIATED WITH THE INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA; RE GROUP OF EMPLOYEES.....

1092

Practice and Procedure - Construction Industry Grievance - Applicant union closing case in chief
without calling evidence - Respondent making motion for nonsuit for failure to prove
unemployed members available to perform improperly subcontracted work - Motion denied
- Missing element only relevant to remedy and remedy yet to be considered by Board

FAIRBANK CARPENTRY AND E & R CARPENTRY INC., ATTICA INVEST-
MENTS INCORP. C.O.B. AS; RE UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL 27.....

1077

Practice and Procedure - Natural Justice - Board member executive director of council that co-or-
dinates bargaining in the ICI sector of the construction industry - Propriety of co-ordinated
collective bargaining as it affects bargaining in residential sector of construction industry

VI

significant issue in case - Whether Board member should be removed from panel - Whether reasonable apprehension of bias	
METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION, A DIVISION OF THE MECHANICAL CONTRACTORS ASSOCIATION TORONTO, FRANK MICHELUCCI, ET AL.; RE SEAN O'RYAN, U.A., LOCAL 46, MECHANICAL PLUMBING CONTRACTORS ASSOCIATION, URBAN MECHANICAL CONTRACTORS LIMITED, ZENTIL PLUMBING AND HEATING CO. LTD., ET AL.....	1104
Ratification and Strike Votes - Duty of Fair Representation - Unfair Labour Practice - Employer soliciting employees to ratify memorandum of settlement - Union acquiescence in employer's conduct - Whether collusion - Whether ratification vote conducted fairly - Whether prima facie case - Board commenting on potential consequence of remedy sought to set aside collective agreement and direct new ratification vote	
CARA OPERATIONS LIMITED AND HOTEL EMPLOYEES, RESTAURANT EMPLOYEES UNION, LOCAL 75 OF THE HOTEL EMPLOYEES, RESTAURANT EMPLOYEES INTERNATIONAL UNION A.F.L.-C.I.O. C.L.C. O.F.L.; RE EMPLOYEES OF CARA OPERATIONS LIMITED FLIGHT KITCHENS #1 AND #2 MALTON	1054
Representation Vote - Certification - Practice and Procedure - Request by applicant that name be amended on certification application from Textile Workers to Laundry and Linen Workers - Request granted but representation vote ordered despite fact that membership evidence over fifty-five percent - Board canvassing instances when discretion exercised under s.7(2) to order vote	
GRUYICH SERVICES INC., A LIMITED PARTNERSHIP AND 656508 ONTARIO LIMITED; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE GROUP OF EMPLOYEES.....	1092
Representation Vote - Charter of Rights and Freedoms - First Contract Arbitration - Termination - Application for declaration terminating bargaining rights and direction of settlement of first collective agreement by arbitration - Whether section 40a restricts freedom to contract - Whether section 7 of the Charter contravened - Whether time limits for termination applications restrict freedom of association - Parties agreeing to representation vote	
EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679	1075
Settlement - Duty of Fair Representation - Unfair Labour Practice - Terminated employee reinstated prior to arbitration through settlement - Settlement waived right of employee to grieve final termination - Whether employee estopped from raising legality or reasonableness of settlement - Board finding that settlement itself not illegal or unreasonable so as to constitute arbitrary, discriminatory on bad faith conduct on part of union	
DURAN, UNAL; RE ONTARIO HYDRO EMPLOYEES UNION, C.U.P.E. LOCAL 1000; RE ONTARIO HYDRO	1068
Settlement - Termination - Two agreements signed by applicant, union and employer requiring representation vote and extending collective agreement - Whether applicant permitted to resile from agreements - Whether company exerted undue pressure - Board refusing to void or not give effect to agreements - Representation vote ordered - Whether costs awarded	
OMSTEAD FOODS LIMITED; RE ROGER SIMPSON; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION NO. 880.....	1120
Termination - Bargaining Unit - Construction Industry - No collective agreement covering non-	

ICI projects and no work performed by employees in ICI sector - Whether applicants can seek termination of bargaining rights for both the ICI and non-ICI sectors - Whether employees working in only one unit can terminate bargaining rights in other one - Effect of statutory scheme imposing province-wide bargaining in ICI sector	
FRED JANTZ MASONRY CONSTRUCTION COMPANY LIMITED; RE MICHAEL C. SZABO ET AL.; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN AND THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 23.....	1083
Termination - Charter of Rights and Freedoms - First Contract Arbitration - Representation Vote - Application for declaration terminating bargaining rights and direction of settlement of first collective agreement by arbitration - Whether section 40a restricts freedom to contract - Whether section 7 of the Charter contravened - Whether time limits for termination applications restrict freedom of association - Parties agreeing to representation vote	
EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679	1075
Termination - Collective Agreement - Timeliness - Collective agreement ratified but not signed formally by union due to discovery of typographical errors - Whether collective agreement in existence to bar termination application	
SEARS CANADA INC., RE EMPLOYEES OF SEARS CANADA INC. (PETERBOROUGH); RE RETAIL, WHOLESALE & DEPARTMENT STORE UNION	1159
Termination - Construction Industry - Timeliness - Conflict between construction industry and general termination provisions - Whether time limits relating to conciliation and one year shelter period applicable to construction industry - Sections 57 and 61 modified by six-month period in section 123	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE ALAN GAGNON	1097
Termination - First Contract Arbitration - Termination application filed prior to s.40a becoming law - Whether s.40a to be interpreted so as to deprive employees of pre-existing legal rights - Whether union's failure to file reply fatal to challenge of termination application - Board hearing all evidence relating to both termination and first contract applications before deciding which to grant	
EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679	1071
Termination - Settlement - Two agreements signed by applicant, union and employer requiring representation vote and extending collective agreement - Whether applicant permitted to resile from agreements - Whether company exerted undue pressure - Board refusing to void or not give effect to agreements - Representation vote ordered - Whether costs awarded	
OMSTEAD FOODS LIMITED; RE ROGER SIMPSON; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION NO. 880.....	1120
Termination - Timeliness - Union certified following three-way vote - Union immediately bound by provincial collective agreement - Termination application filed nine days later during open period of provincial collective agreement - Board exercising its discretion under section 103(2)(i) to refuse application	
R.L.D. ELECTRIC, 618830 ONTARIO LTD. C.O.B. AS; RE PETER KUNKEL; RE I.B.E.W., LOCAL 353	1145
Timeliness - Collective Agreement - Termination - Collective agreement ratified but not signed	

VIII

- formally by union due to discovery of typographical errors - Whether collective agreement in existence to bar termination application
- SEARS CANADA INC.; RE EMPLOYEES OF SEARS CANADA INC. (PETERBOROUGH); RE RETAIL, WHOLESALE & DEPARTMENT STORE UNION 1159
- Timeliness - Construction Industry - Termination - Conflict between construction industry and general termination provisions - Whether time limits relating to conciliation and one year shelter period applicable to construction industry - Sections 57 and 61 modified by six-month period in section 123
- INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE ALAN GAGNON 1097
- Timeliness - Termination - Union certified following three-way vote - Union immediately bound by provincial collective agreement - Termination application filed nine days later during open period of provincial collective agreement - Board exercising its discretion under section 103(2)(i) to refuse application
- R.L.D. ELECTRIC, 618830 ONTARIO LTD. C.O.B. AS; RE PETER KUNKEL; RE I.B.E.W., LOCAL 353 1145
- Unfair Labour Practice - Certification Where Act Contravened - Interference in Trade Unions - Staff reduction "experiment" imposed by employer - Staff meetings held to explain effects of unionization - Respondent going beyond freedom of expression reserved to employer - Staff reductions linked to unionization - Union certified under s.8
- AURORA RESTHAVEN EXTENDED CARE & CONVALESCENT CENTRE, CEBY MANAGEMENT LIMITED OPERATING AS; RE C.L.A.C.; RE GROUP OF EMPLOYEES 1031
- Unfair Labour Practice - Damages - Duty of Fair Referral - Whether formula in *Portiss* to be used to quantify damages flowing from s.69 breach - Complainants would have fared better than average union member but for s.69 breach - *Portiss* formula modified to reflect circumstances of case
- D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1089 AND ROCCO D'ANDREA 1058
- Unfair Labour Practice - Duty of Fair Representation - Evidence - Union not referring discharge grievance to arbitration - Union not calling any evidence at hearing - Employee's discharge grievance so lacking in merit that no explanation of its decision not to go to arbitration required of the union - Onus of proof in s.68 complaint discussed
- ROBINSON, ROBERT; RE TORONTO PRINTING PRESSMAN AND ASSISTANTS' UNION NO. 10; RE RONALDS PRINTING, RICHMOND HILL 1151
- Unfair Labour Practice - Duty of Fair Representation - Ratification and Strike Votes - Employer soliciting employees to ratify memorandum of settlement - Union acquiescence in employer's conduct - Whether collusion - Whether ratification vote conducted fairly - Whether prima facie case - Board commenting on potential consequence of remedy sought to set aside collective agreement and direct new ratification vote
- CARA OPERATIONS LIMITED AND HOTEL EMPLOYEES, RESTAURANT EMPLOYEES UNION, LOCAL 75 OF THE HOTEL EMPLOYEES, RESTAURANT EMPLOYEES INTERNATIONAL UNION A.F.L.-C.I.O. C.L.C. O.F.L.; RE EMPLOYEES OF CARA OPERATIONS LIMITED FLIGHT KITCHENS #1 AND #2 MALTON 1054
- Unfair Labour Practice - Duty of Fair Representation - Settlement - Terminated employee rein-

stated prior to arbitration through settlement - Settlement waived right of employee to grieve final termination - Whether employee estopped from raising legality or reasonableness of settlement - Board finding that settlement itself not illegal or unreasonable so as to constitute arbitrary, discriminatory on bad faith conduct on part of union

DURAN, UNAL; RE ONTARIO HYDRO EMPLOYEES UNION, C.U.P.E. LOCAL 1000; RE ONTARIO HYDRO 1068

Unfair Labour Practice - Parties - Plant shutdown following filing of certification application - Employees laid off following certification - Statement to employees threatening shutdown - Breach of sections 64, 66 and 70 found - Order made against both company and president and sole shareholder personally

WALTER TOOL AND DIE LTD.; RE UNITED STEELWORKERS OF AMERICA; RE ERWIN WALTER 1167

Witness - Arbitration - Employee Reference - Practice and Procedure - Whether individual an "employee" - Board not deferring to arbitration - Whether witness entitled during cross-examination to discuss with own counsel whether specific questions must be answered - Applicability of Rules of Professional Conduct and *Statutory Powers Procedure Act*

REXWOOD PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1139

1283-85-R; 1312-85-U Christian Labour Association of Canada, Applicant, v. Ceby Management Limited operating as **Aurora Resthaven Extended Care & Convalescent Centre**, Respondent, v. Group of Employees, Objectors; Christian Labour Association of Canada, Complainant, v. Ceby Management Limited operating as **Aurora Resthaven Extended Care & Convalescent Centre**, Respondent

Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Staff reduction "experiment" imposed by employer - Staff meetings held to explain effects of unionization - Respondent going beyond freedom of expression reserved to employer - Staff reductions linked to unionization - Union certified under s.8

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *F. W. Murray* and *B. L. Armstrong*.

APPEARANCES: *Elizabeth Forster* and *Ron Rupke* for the applicant/complainant; *Corinne F. Murray*, *Brent Binions* and *Evelyn Wilkinson* for the respondent; *Helen Rye*, *Beth Northfield*, *Leanne Vandaele* and *Joanne Stoneman* for the objectors.

DECISION OF THE BOARD; July 23, 1986

1. File No. 1283-85-R is an application for certification. File No. 1312-85-U is a complaint under section 89 of the *Labour Relations Act* in which the Christian Labour Association of Canada (referred to in this decision as "CLAC" and as the "union") alleges that the respondent, Ceby Management Limited operating as Aurora Resthaven Extended Care & Convalescent Centre ("Aurora Resthaven") has contravened sections 3, 64, 66, 70, and 79 of the Act. Those alleged contraventions of the Act also form the basis of a request by CLAC that it be certified without a representation vote under section 8 of the Act.

2. The Board finds that CLAC is a trade union within the meaning of section 1(1)(p) of the Act.

3. Having regard to the agreement of the parties, the Board finds that the following constitute units of employees of the respondent appropriate for collective bargaining:

Bargaining Unit #1

All employees of the respondent at Aurora, save and except department heads and co-ordinator, persons above the rank of department head and co-ordinator, registered and graduate nurses, office and clerical staff, paramedical personnel, chaplains, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

Bargaining Unit #2

All employees of the respondent at Aurora regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads and co-ordinator, persons above the rank of department head and co-ordinator, registered and graduate nurses, office and clerical staff, paramedical personnel and chaplains.

4. On August 22, 1985, the date of the application for certification, there were 82 employ-

ees in bargaining unit #1 and 58 employees in bargaining unit #2. Those bargaining units are composed of nurses' aides, registered nursing assistants, laundry department aides, dietary department aides, housekeeping aides, maintenance aides, and other service workers. As of September 3, 1985, the terminal date fixed for the certification application, and the date which the Board determines under section 103(2)(j) of the Act to be the time for the purpose of ascertaining membership under section 7(1) of the Act, 39 of the 82 employees in bargaining unit #1 (47.6%) and 24 of the 58 employees in bargaining unit #2 (41.4%) were members of CLAC.

5. Evelyn Wilkinson is the Administrator of Aurora Resthaven, and is also the Director of Operations for three other nursing homes operated by Ceby Management Limited. She prides herself on her "open door" management policy, and encourages employees to make suggestions and voice concerns. During the four days of hearing devoted to this case, the Board heard testimony from seven witnesses and also received fourteen exhibits. It is clear from the totality of the evidence that Ms. Wilkinson is an experienced and competent administrator who is trusted and respected by her staff.

6. In mid May of 1985, an employee expressed concern to Ms. Wilkinson about a "visitor" whom Ms. Wilkinson presumed (correctly) to be a union representative who was attempting to organize the home's employees. Although the evidence is somewhat unclear in this regard, it appears that the "visitor" was either Ron Rupke or another representative of CLAC. As an Ontario Representative of CLAC, Mr. Rupke was the collector on a number of the membership cards filed with the Board in support of this application. He also signed the two (Form 9) Declarations Concerning Membership Documents that have been filed with the Board. There is no evidence that Mr. Rupke or any other official of CLAC engaged in any improper conduct during the organizing campaign which gave rise to the instant application.

7. Ms. Wilkinson holds weekly "rap sessions" with the staff on Wednesday afternoons during their 2:30 p.m. coffee break. She told the Board that the purpose of those sessions is to communicate with employees and to solve problems. Prior to each "rap session", she and Betty Smith, the respondent's Director of Nursing, each prepare an agenda of items they wish to discuss with the staff. After those items have been discussed and the respondent's Activity Supervisor has reported on current and future events, staff members are given an opportunity to raise any problems that they are having and to assist in resolving them. Problems that are not resolved at one meeting are raised again at future meetings until a satisfactory solution is obtained. During one such "rap session" in June of 1985, Ms. Wilkinson, who had continued to hear about the union's organizational visitations, told employees that if the union came in, there would be staff reductions at the home. Although she testified that her statement was not intended to be a threat, she conceded in cross-examination that job security was important to the respondent's employees and that a statement linking layoffs with unionization could have a chilling effect on the staff.

8. Ms. Wilkinson also meets from time to time with the students employed by the respondent. During the course of one such meeting in the summer of 1985 (the precise date of which is unclear from the evidence), Ms. Wilkinson asked if any of the students had been contacted by the union. After receiving no reply to that question, she told them that if the union came into the home, there would be a demand for higher wages which would result in staff reductions with students being the first people to be let go.

9. During June, July, and August, approximately fifteen other employees approached Ms. Wilkinson concerning the union "visitor". Some of them asked Ms. Wilkinson for advice about how to handle the situation. Her advice to them was that if they were telephoned they could hang

up, and if they were visited at home "they didn't have to open the door or as a last resort they could call the police".

10. In mid August Ms. Wilkinson received a telephone call from an employee's husband who (in Ms. Wilkinson's words) "was very concerned that his wife could not defend herself" in dealing with the "visitor". Ms. Wilkinson told the Board that the husband requested her to "do something" on behalf of the staff. A day or two later, Ms. Wilkinson posted a notice to employees. She was unable to file that notice with the Board as she threw it away when she took it down and did not retain a copy. However, it was her evidence that the notice read: "If anyone is upset or concerned by visits from other than Aurora Resthaven, I am here if you need me." She conceded in cross-examination that the notice also referred to "phone calls" and was intended to relate to visits or telephone calls by a union organizer. It was interpreted by at least one of the respondent's employees to be an invitation to advise Ms. Wilkinson if any of the home's employees were approached about joining a union. Ms. Wilkinson removed that notice when the respondent received notification of CLAC's application for certification. In explaining the removal of that notice, Ms. Wilkinson testified that there was no longer any point in having it posted as she "could not help anyone" and "didn't want to get into any problems".

11. After that notice was posted, Ms. Wilkinson had visits from several employees asking her what she was going to do about the union. On or about August 21 some of the staff members opposed to the union suggested to Ms. Wilkinson that it might be useful to cut back on normal staffing patterns on a "trial run" basis to show the employees what it would be like to work with a shortage of staff. The assumption which underlay that "experiment" was that if Aurora Resthaven were unionized, wage levels would increase and the number of staff would drop. In cross-examination, Ms. Wilkinson initially denied that the purpose of the "experiment" was to give the staff an idea of what she thought it would be like in the home if the union obtained bargaining rights; she told the Board that it was merely an experiment to determine how the staff could cope with less hours. However, under further cross-examination she conceded that she knew that the union was organizing and was of the view that if the union came in there would be higher wages and less hours. Although she attempted to maintain that as "part of [her] overall management technique" she merely wished to determine if her staff could cope, she ultimately conceded that one of the purposes of the experiment was to give the staff an idea of what she thought it would be like in the home if the union came in. Although Ms. Wilkinson testified that she did not use the word "union" in describing the purpose of the experiment to employees, that testimony was contradicted by evidence given by other witnesses whose testimony we find to be more reliable than that of Ms. Wilkinson concerning the matter.

12. Having decided to conduct the staff reduction "experiment", Ms. Wilkinson met with Ms. Smith and directed her to reduce the timetable for a two-day period. In accordance with those instructions, Ms. Smith prepared a revised schedule for each of the home's three floors for Monday August 26 and Tuesday August 27. The information at the top of each schedule read:

THE FOLLOWING STAFF MEMBERS ARE REQUESTED TO WORK ON MONDAY & TUESDAY - OTHERS WILL RECEIVE RENUMERATION [sic] FOR TIME THEY ARE NORMALLY SCHEDULED FOR - I AM ASKING FOR YOUR CO-OPERATION AND APPRECIATE OUR MUTUAL CONCERNS.

Each of the revised schedules also contained the following information, printed in block letters and underlined, immediately above Ms. Smith's signature in the lower right corner:

FOR MONDAY & TUESDAY ONLY REGULAR SCHEDULES WILL NOT BE IN EFFECT.

TEMPORARY INCREASE IN WAGES WILL BE PAID TO STAFF WHO ARE WORKING. MANY THANKS.

13. Ms. Wilkinson originally planned to reduce the number of hours by a third, but did not ultimately do that because she was concerned about the well-being of the residents and the staff. Nevertheless, "nursing care" was reduced by about 17%, from 2.15 to 1.79 hours of "nursing care per patient per day". Ms. Wilkinson told the Board that the typical staffing level is 2.0 to 2.1 in non-unionized nursing homes, and 1.6 to 1.9, with an average of 1.7, in unionized homes. She based those figures on her general knowledge of the industry, on the information which she obtained in preparing a paper entitled "Unions are not necessary to meet needs in the Long Term Care Facility" (which she submitted in March of 1981 in fulfillment of the requirements of a research methodology course), and information which she obtained through subsequent efforts to keep her knowledge up-to-date.

14. As suggested by its title, Ms. Wilkinson's paper left no room for doubt concerning her views about unionization in the nursing home industry. The "introduction" to the paper reads as follows:

There has been an increase in the number of unions entering into the nursing home industry causing wages of the staff members to be considerably elevated and necessitating reduction of the numbers and staff on shifts.

Within the Long Term Care facility there is a high level of physical, psychological and social needs for each resident to attain a productive and satisfying life style. This can be achieved through the efforts of sufficient staff members of different disciplines who are committed to geriatrics.

Because nursing homes are privately owned, the owners carry a heavy financial burden of mortgages and interests unlike the acute care facilities which are built and maintained by public funds. When the percentage of wage expense increases the operator is forced to reduce the staff hours with the result that fewer staff members must try to achieve the impossible. This is a fact of life and the resident of the nursing home is the receiver of the economic pinch.

The ideal situation to achieve the highest quality of life for the resident and the highest quality of the working life of the staff members is to maintain a therapeutic environment, without a union.

I am attempting to prove that Long Term Care facilities, if management is concerned about the well being of the staff, can manage to reach the goals much better without a union than with one.

In summarizing her views concerning the effects of unions in long term care facilities, she wrote as follows (at page 22 of her paper):

I feel that unions within institutions are not conducive to creating a 'caring atmosphere' which is essential in the long term care sector because of the lengthy stays of most of the residents within the facility.

Unions in long term care facilities bring with them:

- (a) alienation of staff from management
- (b) alienation of the R.N. from the R.N.A.
- (c) alienation of the registered staff from nurses aides
- (d) drastic increases in staff wage expenses

- (e) loyalty of staff members to an outside authority
- (f) drastic decreases in staff ratios to offset the wage increase
- (g) the end of the open door policy
- (h) the decreasing of the quality of the working life of the employees due to excessive work demands
- (i) the decreasing of the quality of life of the geriatric resident who requires time to have good care, good communications and good reactivation
- (j) the decreasing of flexibility for job transfer and of job descriptions due to contractual [sic] demands
- (k) a generalized lowering of morale and motivation for high achievement.

When she was asked during cross-examination if she still holds those views, Ms. Wilkinson indicated that she does and stated, "I have experienced many of them in my direct experience". She also acknowledged in cross-examination that she felt a sense of personal failure when the employees of Aurora Resthaven turned to a union. She told the Board, "I felt I missed the mark. I obviously didn't meet our staff's needs".

15. At about 1:30 p.m. on August 23, Ms. Wilkinson met with the home's dietary staff and told them about the planned "experiment" and how it would effect them. She met with the laundry and housekeeping staff approximately fifteen minutes later and then went to meet with the first floor staff and, subsequently, with the second floor staff and the third floor staff. One of the persons present when Ms. Wilkinson met with the first floor staff was Wendy Ferguson, who has been a nurses' aide in the employ of the respondent since January of 1982. Ms. Wilkinson told Ms. Ferguson and the other first floor employees that she understood that a union was attempting to organize the home. When Ms. Ferguson asked her how she knew that the union was coming in, Ms. Wilkinson said that she had been in the business for a long time and that she had "loyal staff". Ms. Wilkinson told the first floor staff that if the union came in, they would get more money but would have to pay more taxes. She also told them that they would lose privileges that they didn't even know they had. When Ms. Ferguson asked about shift work, one of the other employees said, "It stays". This prompted Ms. Wilkinson to say, "Not if management doesn't want it." That statement was of particular concern to Ms. Ferguson, who was unable to work any shift other than the afternoon shift as she had three young children whom her husband, who worked days, looked after while she was at work. Although Ms. Wilkinson told the Board in cross-examination that she did not remember that matter being raised, we accept Ms. Ferguson's evidence that it was and that Ms. Wilkinson made the statement quoted above. In this regard, we find no merit in counsel for the respondent's argument that Ms. Ferguson's evidence should not be permitted to support an unfair labour practice. Schedule "A" to CLAC's section 89 complaint makes it clear that part of the improper or irregular conduct about which it is complaining is a threat by Ms. Wilkinson, made to employees during the afternoon of August 23, 1985, that if a union got in, they would lose all of their privileges, including some they didn't even know they had. Ms. Ferguson's testimony is merely some of the evidence by which that material fact has been proved. (See section 72 of the Board's Rules of Procedure.) Moreover, we would note that even if that evidence could be viewed as pertaining to an unparticularized allegation (which in our view it cannot), the respondent has not been prejudiced by our reception of it as the respondent had ample opportunity to recall in reply Ms. Wilkinson, who was present throughout the hearing as an advisor to counsel for the respondent.

16. In explaining the schedule revisions for August 26 and 27, Ms. Wilkinson told the staff

that it was a trial cutback to see what it would be like with higher wages and fewer staff if the union came in. She also indicated that if the union came in, the atmosphere of the home would not be as warm and as caring as it had been. As noted above, she told employees that if the home were unionized, the employees would lose some of their existing privileges. One of the examples which she gave was the privilege of fitting their social lives into their work lives by taking time off when they wished. In this regard she noted that employees had been permitted to take vacations and leaves of absence up to five times a year. She advised them that those privileges "would be impossible to continue". She further stated that Aurora Resthaven would have to cut down on privileges because under a union contract "it's cut and dry - the rules are adhered to irregardless of your personal needs and wants." She also told them that if the union gained bargaining rights there would be less staff because "it's an automatic assumption that if the wages go up, the number of hours come down." She advised the employees previously scheduled to work, who had been removed from the schedule as a result of the "experiment", that they would not lose any wages, and told those who remained scheduled to work that they would receive an extra dollar per hour for the "sacrifice and efforts" in maintaining the same quality of care for the residents with a lesser number of staff. After showing employees the revised schedules, she posted them on the bulletin board.

17. Ms. Wilkinson met later that day with the third floor evening shift, which included a number of students. After explaining the "experiment" and the revised schedule, she told them that if the home were unionized, the students would not be able to stay because there would be a cutback in staff and senior staff would take over their jobs. The students were very upset by that statement, which was prefaced by Ms. Wilkinson stating, "I might get in trouble for saying this". When one of the students stated that she knew of a unionized nursing home that did employ students, Ms. Wilkinson became very upset and said no more about the matter. Although Ms. Wilkinson acknowledged in cross-examination that she was aware that the students would not want to lose their jobs and that she expected the students to believe what she said, she denied that the statement was designed to convince the employees not to have anything to do with the union. However, we do not find that denial to be credible in the circumstances of this case.

18. At her monthly meeting with students on September 17, 1985, Ms. Wilkinson apologized for having given them inaccurate information concerning employment of students in unionized nursing homes. However, there were only three students in attendance at that meeting. Moreover, it was held two weeks after September 3, 1985, which, as noted above, is the terminal date fixed for this application and the date which the Board has determined to be the time for the purpose of ascertaining membership under section 7(1) of the Act, in accordance with the Board's usual practice in that regard.

19. In each year since she became the Administrator in 1980, Ms. Wilkinson has met with employees around April 1 (the beginning of the respondent's fiscal year) to discuss their financial needs and expectations. In preparing for those discussions, Ms. Wilkinson generally reviewed information provided by the Ontario Nursing Homes Association concerning wages and staff ratios. She would also speak with a number of personal contacts in various parts of Ontario. During those annual discussions, Ms. Wilkinson told the staff at Aurora Resthaven that the home could either retain the same number of employees and give employees a smaller wage increase, or cut down on staffing levels and provide a larger wage increase. She told the Board that she "used to compare it to an accordian", and suggested that the latter approach was "similar to an accordian being squeezed together." During those meetings Ms. Wilkinson also expressed the view that a decline in the staffing level would cause the quality of working life and the level of care of the home's residents to deteriorate. The employees' response in April of 1985, and in each of the pre-

ceding years, was that they were willing to forgo a larger wage increase in order to retain existing staffing levels.

20. CLAC filed its application for certification with the Board on August 22, 1985. The respondent received notice of that application from the Board on the afternoon of August 26.

21. In addition to the aforementioned reduction in "nursing" hours, staff hours at Aurora Resthaven were reduced on August 26 by 17% (from 69-1/4 to 57-3/4 hours) in the dietary department, 26% (from 39-1/2 to 29-1/4 hours) in the housekeeping department, and by 21% (from 14 to 11 hours) in the life enrichment department. No changes were made in laundry and maintenance staff levels.

22. Although the reduced staff "experiment" was originally intended to continue for two days, it was brought to an end after the first day because the respondent received notice of CLAC's application for certification and because the care of the residents had been adversely affected. In describing the effect of the "experiment", Kara DeGeer, a high school student who works as a part-time employee on the respondent's third floor, told the Board: "It was very chaotic. It wasn't organized. The residents suffered because they weren't being taken care of properly because we didn't have the time." Ms. Ferguson also testified that it was "really busy and hectic" during her shift, particularly between 5:00 and 10:00 p.m. Ms. Marshall also described the situation as having been "hectic" on August 26 and added: "I don't think the care was up to the usual standard. The girls had to work harder and faster. We didn't have time for the last round that we usually do at the end of the evening."

23. Ms. Wilkinson initially planned to meet with employees on Wednesday August 28 to "communicate with the staff the status of what was going on at Resthaven." However, those meetings were rescheduled by management to Tuesday August 27 at 3:00 and 3:30 p.m., after the respondent received notice of CLAC's application for certification.

24. The meetings were held in the conference room in the basement of the home. Ms. Wilkinson was accompanied at each of those meetings by Brent Binions, a lawyer who is the son of the owner of Aurora Resthaven, and who is also the Vice-President of JBG Management Inc. ("JBG") which oversees the management of a number of nursing homes, including Aurora Resthaven. After introducing Mr. Binions as a lawyer whose father owned Aurora Resthaven, Ms. Wilkinson turned the meeting over to Mr. Binions, who had never previously been present at an Aurora Resthaven staff meeting. Mr. Binions told the employees that although he was a lawyer who had learned something about labour law, he was by no means an expert. He then told them that the meeting had been called to attempt to get the home on as even a keel as possible since there was much upset and turmoil. After reading them section 64 of the Act, Mr. Binions told the employees that all he could do was give them "facts". He stated that he could answer questions on a factual basis but could not give his opinion because if he did there would be "automatic certification". He then read to them from the Board's (Form 6) "green sheet" and told them that he would explain what it meant later. After reading the description of the bargaining unit sought by CLAC, Mr. Binions told the employees that Aurora Resthaven had the right to have full-time and part-time employees placed in separate bargaining units, and intended to exercise that right. He then held up the "green sheet" and told employees that if they wanted to send in something for or against the application, everything they could do was set out on the "green sheet". He proceeded to explain the terminal date and the Board's certification process, including the respective membership percentages which generally result in "automatic certification", a representation vote, and a dismissal of the application. He told the employees that nobody knew for sure where the application stood since Aurora Resthaven did not know how many membership cards CLAC had signed

and CLAC did not know how many employees were on the employer's list for the full-time and part-time bargaining units. After explaining (in response to a question) that it was possible to have one of the bargaining units "automatically certified" and the application pertaining to the other bargaining unit dismissed, Mr. Binions was asked, "Why do people join a union?" His answer was, "I don't know." Another employee then stated, "It's to get more money." Mr. Binions agreed that that was one of the most common reasons. The next question was, "What happens if we do get more money?" Mr. Binions prefaced his answer to that question with the observation that he was getting into a nebulous area in which he had to be very careful to confine himself solely to "facts" in order to avoid creating a situation in which the union might be certified without a representation vote pursuant to section 8 of the *Labour Relations Act*. In responding to that question, Mr. Binions stated that management knew at the beginning of each (fiscal) year precisely what the home's revenues would be for that year, since revenues in the nursing home industry are set by the Government of Ontario. He also indicated that management knew what their other expenses would be for such items as taxes, food, utilities, and wages. He suggested that the amount the home had available to pay wages could be looked on as a "wage pie". In explaining the implications of that analogy, he told employees, "There are a number of pieces of the pie, with each employee getting a piece. If some people get larger slices, you can see the results." In cross-examination, Mr. Binions acknowledged that "the implication was clear": there would be fewer people sharing in the pie. It was the recollection of some of the employees, such as Denise Morin (who was summonsed to testify in these proceedings by the union) that Mr. Binions referred to all of the home's expenses as being a pie of which wages was one slice. However, it is of no real significance whether Mr. Binions referred to wages as being the entire pie or merely one slice of it. What is significant is that his analogy made it abundantly clear to employees that management was of the view that unionization at the home would result in reductions in staffing. In describing her reaction to Mr. Binions' words, Ms. Morin testified: "It made me wonder how safe my job was going to be because I hadn't been there that long. If there was going to be less people getting a bigger slice...I hadn't been there long so I would be one of the people to go." It is reasonable to infer that Mr. Binions's words engendered similar concerns on the part of other employees.

25. Other questions answered by Mr. Binions at that meeting pertained to union security clauses, religious exemptions from union membership, and statements of desire in opposition to the application. Mr. Binions provided detailed answers to each of those questions, and read or paraphrased pertinent passages from the Board's "Guide to the Ontario Labour Relations Act." Near the end of the meeting, Mr. Binions gave interested employees a copy of the "green sheet" and told them that copies of it would be posted in the lunchroom.

26. After the first group of approximately sixty employees left the conference room, Mr. Binions went to the lunchroom and posted copies of the "green sheet". He then returned to the conference room and met with about thirty of the employees from the other shift. That second meeting proceeded in the same manner as the first one, although it was somewhat shorter since there were fewer questions asked by employees. When Mr. Binions failed to mention the "wage pie", Ms. Wilkinson suggested that he use that analogy again because she felt that "it might be of some importance to the second group". After giving a similar preface to his remarks and reiterating his "fear of section 8", Mr. Binions repeated his earlier statements about the "wage pie".

27. The rates which Aurora Resthaven and other nursing homes in Ontario charge residents are set by the Provincial Government. The ward rate is \$45 per day, of which \$26 is paid by the Government, with the balance being paid by the resident (unless the resident is indigent, in which case the Government pays the entire rate). The semi-private rate is \$6 per day above the ward rate, and the private rate is another \$6 above that. Although Aurora Resthaven earned a profit in

1985, Mr. Binions testified that "all of the [1985 profits] and substantially more was paid to the bank in loan repayments over the course of the year."

28. The following letter dated February 7, 1986, from Paul J. Gould, Director of the Nursing Homes Branch of the Ontario Ministry of Health, to counsel for the respondent, was received by the Board as proof of the truth of its contents on the agreement of the parties:

Dear Ms. Murray:

Thank you for your letter of January 29, 1986 regarding staffing statistics.

As discussed, we are only able to provide you with the average hours of care for groups I and II-2.26 and 1.75 respectively. These figures represent the average hours of care provided by *all* nursing staff including health care aides, nurses' aides, to *each* resident per day.

It is necessary to point out that these figures may not be reflective of the current status of the hours of care provided in the homes. These data are collected during various inspection visits scheduled over a period of months and vary from time to time according to required care hours.

I trust this will be of assistance to you.

The parties are also in agreement that Group I consists of the following non-unionized nursing homes: King City Lodge, Maple Nursing Home, Mariann Nursing Home (in Richmond Hill), and Green Gables Manor (in Stouffville). Group II consists of Bestview Nursing Home (in Newmarket) for which CLAC holds bargaining rights; TLC Manor Nursing Home (in Newmarket), TLC Villa Nursing Home (in Bradford), and Country Place Nursing Home (in Richmond Hill), for which the Canadian Union of Public Employees ("CUPE") holds bargaining rights; and Extendicare (in North York) for which either CUPE or the Service Employees International Union ("S.E.I.U.") holds bargaining rights.

29. Mr. Binions told the Board that the figures contained in that letter are quite consistent with his knowledge of the norms for the nursing home industry. He testified that the comparable figures for the non-unionized and unionized nursing homes managed by JBG are 2.25 and 1.9. He explained that JBG's unionized homes "run a bit high because [JBG] is committed to giving a proper level of care". The two unionized homes managed by JBG are White Eagle, for which SEIU holds bargaining rights, and Newmarket, for which CUPE holds bargaining rights. Mr. Binions has never bargained with CLAC, nor does he have any experience in working with a home organized by CLAC.

30. In attempting to justify his reference to the "wage pie", Mr. Binions initially testified that the respondent would have to cut hours if there was any wage increase at all, as it is at the maximum staffing permitted by its level of funding. However, he later conceded that the 4% increase which has been negotiated with the Ministry of Health for 1986 will enable the respondent to give employees a similar increase. He also conceded that some of the items which a union might wish to negotiate, such as job security and seniority rights, do not impose a financial burden on an employer.

31. The testimony of Helen Rye, one of the objectors in these proceedings, indicates that when Mr. Rupke came to see her about the union, he advised her that he would try to get the respondent's employees "maybe two dollars more and benefits", as well as greater job security. Ms. Rye is one of the respondent's (full-time) health care aides. The possibility of obtaining higher wages through unionization was also mentioned to Ms. Morin and Ms. DeGeer by a CLAC organizer. When he telephoned Ms. Marshall to discuss the union organizing campaign, Mr. Rupke compared her wage rate with that paid to employees represented by CLAC at Bestview in New-

market. She was being paid approximately a dollar an hour less than her counterparts at that nursing home. Mr. Rupke told Ms. Marshall that CLAC would attempt to win wage increases for the respondent's employees if that was what they wanted. He also compared the benefits provided by the respondent with those provided by Bestview and told her that it would be possible for CLAC to bargain with the respondent for similar benefits if that was the desire of the respondent's employees. Thus, although Mr. Rupke raised the possibility of obtaining higher wages as one of the potential advantages of union membership, he also indicated that the employees' wishes in that regard would be taken into account in formulating the union's bargaining proposals. Moreover, at the time of the "experiment" and the August 27 staff meetings, neither Ms. Wilkinson nor Mr. Binions had had any discussions with CLAC concerning what its wage demands would be. Thus, the "experiment" and the aforementioned statements concerning effects of unionization were based solely on assumptions which they made concerning what CLAC's wage proposals would be.

32. After being advised by employees of the respondent concerning a number of the events which form the subject matter of CLAC's section 89 complaint, Mr. Rupke sent the following letter dated September 4, 1985 (together with the pamphlet to which it refers) to all staff members of the respondent for whom CLAC had addresses:

TO ALL STAFF MEMBERS OF AURORA RESTHAVEN

Subject: Staffing Levels, Resident Care, Union Dues, Union Rep Salaries

By now you are all aware that Christian Labour Association of Canada (CLAC) has applied to the Ontario Labour Relations Board for the right to represent you as your collective bargaining agent. We made this application on August 22, 1985 after a long campaign in which we called or visited most staff members. A sizeable majority has signed up and we have good support in every department. However, it is up to the Labour Relations Board to make the final count and that event has been scheduled for September 13, 1985. We should know about where we stand after that date. If our certification is delayed at that hearing, we will make every effort to keep you informed of the reasons why.

Staffing Levels and Resident Care

Some members have informed us that the management team at Resthaven has persistently told staff members that joining a union will cause staff reductions. This would result in much more hectic working conditions for the remaining staff and a decline in resident care. Apparently to emphasize the point, management introduce a temporary, short-staffed schedule to be worked on Monday, August 26 and Tuesday, August 27.

As soon as we learned about these actions of management, we filed charges of unfair labour practice with the Ontario Labour Relations Board, and we have since learned that the temporary schedule was not used on the Tuesday. In our opinion these words and actions of management are illegal because they attempt to intimidate or coerce staff members to not join the union, or to cease being members of the union. Since the damage is already done, the Labour Relations Board will now have to decide whether or not CLAC is correct in this opinion.

The question remains: will certification of CLAC cause staff reductions? Our answer is no. In fact, the *Labour Relations Act*, section 79, requires your employer not to alter terms of your employment, or any rights, privileges or duties without the consent of the applicant union (CLAC). We can state here quite clearly that we have no plans to agree with staff reductions that might cause heavier workloads and a decline in resident care.

The freeze in working conditions imposed by section 79 of the *Labour Relations Act* continues until management and union have settled a contract. Since management has indicated that staff cuts may be coming, we are sure that you want to do all you can to prevent such action on management's part. You can be sure that CLAC will do everything legally possible to meet your concerns about staffing.

We feel that management has unfairly given you this choice: either continue to accept inferior wage levels, or force staff cuts that would hurt the quality of resident care. It is unfair to state the problem in that way, as it would be unfair to suggest that the nursing home owner ought to operate on a nonprofit basis if he is concerned about resident care.

High quality resident care is a concern of all parties involved in the operation of a nursing home, including the Ministry of Health, residents and their families, owners and administrators, staff members, and yes, the union representing the staff too. CLAC has frequently made contributions to uphold high standards of resident care--in ongoing representation at about 45 Ontario health care facilities, in publications and submissions to the government, and most recently in the work of a task force study into the living and work environments of institutions set up to care for the elderly.

About Union Dues and Staff Salaries

Recent statements by representatives of Aurora Resthaven may have cast a shadow over CLAC as the union which has applied for the right to represent you. We wish to state clearly our policies on union dues and our practice on staff salaries.

CLAC policy is to require union dues from all employees once they are covered by a collective agreement. Dues are based on income and are normally paid via payroll deduction. In nursing homes, full-time employees are deducted two hours wages per month as the equivalent of union dues while part-time employees pay 1 1/2 hours wages per month.

CLAC collective agreements never require employees to become union members, and give employees who conscientiously object to union membership the choice of directing their dues money elsewhere.

Finally, it has been suggested that our staff representatives are very highly paid and care only for your money. Such statements could only have been made by persons who know nothing about CLAC and who have not bothered to find out. In fact, the highest paid CLAC staff rep currently earns less than \$30,000 per year. Most staff members earn much less. While that is a lot of money by comparison with the wages paid to nursing home staff members, it cannot be considered excessive by comparison with other positions of comparable training, level of responsibility, and long hours. In fact, CLAC's top salary may seem rather modest by comparison with monies paid to nursing home administrators.

And Finally

We would like to keep you informed about ourselves, since we hope to be authorized to serve you as your union soon. Therefore, we have enclosed a pamphlet with this newsletter, introducing CLAC and explaining very briefly who we represent and how we operate.

We have deliberately sent this letter to all staff members of Aurora Resthaven for whom we have addresses, regardless of CLAC membership. This is our way of saying that we will welcome anyone who wishes to apply for membership once we are certified, in order to attend our first contract proposals meeting. We are particularly concerned about the few individuals who have threatened to quit their jobs rather than work under a union contract. We hope that these Resthaven employees will reconsider such statements and see the other side of the story.

33. Counsel for the respondent submitted that her client had not contravened the Act. In this regard, she noted that if CLAC obtains bargaining rights for employees of the respondent, the wage rates and other terms and conditions of employment will be determined by interest arbitration under the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980, c. 205, in the event that the parties are unable to reach agreement. She further contended that arbitration awards under that legislation have produced higher wage levels than those paid by the respondent at Aurora Resthaven. In view of the fixed revenues available to the respondent, counsel contended that her client was justified in telling employees that higher wages through unionization would lead to staff reductions, and in carrying out the aforementioned "experiment". She argued that there is no more than

an “infinitesimal likelihood” that CLAC would settle for a wage increase at a level which would not necessitate any staff reductions. She further contended that the views expressed by Mr. Binions and Ms. Wilkinson on behalf of the respondent fall within the ambit of the employer’s “freedom to express his views” under section 64 of the Act. Although she acknowledged that the views expressed by them had an impact on job security, she argued that they were stating demonstrable facts or opinions based on demonstrable facts, and that they were not motivated by anti-union animus. She further submitted that the “experiment” merely put into action what management was entitled to express verbally.

34. With respect to CLAC’s application for certification under section 8, respondent’s counsel argued that even if her client had breached the Act, the breaches on which CLAC relied would not warrant certification without a representation vote. She further argued that the Board should not exercise its discretion under section 8 in the circumstances of this case since (in her submission) any harm that may have been done has been rectified by Mr. Rupke’s letter of September 4, 1985, and by the time that has elapsed since the events in question. In this regard, she contended that a remedial order allowing CLAC to address the employees and send materials to them prior to a representation vote would be a more satisfactory way to dispose of the matter than a section 8 certificate.

35. Ms. Rye, who served as the spokesperson for the objectors, also expressed opposition to certification under section 8. Indeed, she went so far as to suggest that no representation vote should be taken “because management has been good to the girls”. She expressed concern that if CLAC is certified, the residents and the staff will all suffer the effects of reduced staffing levels.

36. Respondent’s counsel and Ms. Rye made their arguments orally before the Board on the final day of hearing of these matters. On the agreement of the parties, counsel for CLAC subsequently submitted written argument, which was followed by written reply argument. Having carefully considered all of those oral and written submissions, as well as the totality of the oral and documentary evidence adduced before the Board during the hearing of these matters, the Board has made the findings of fact set forth above and has reached the conclusions set forth below.

37. Section 64 of the Act expressly reserves the freedom of an employer to express his views, so long as he does not use coercion, intimidation, threats, promises, or undue influence. In commenting on the scope of that freedom and its express limitations, the Board wrote, in part, as follows in *Seven-Up/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87:

.... In assessing employer conduct the Board is obliged to take into account the responsive nature of the relationship of employees with their employer. Predictions of what the future holds may constitute threats or promises, if it is in the power of the employer to make the predictions come true and the employees perceive in their employer a willingness to exercise that power in response to the success or failure of their attempt at unionization. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the restraint on an employer’s freedom of expression was explained in this way:

The Act recognizes that an employer is in the more immediate position to affect an individual’s employment relationship, if only by virtue of its freedom to advance, preserve, impede or terminate an individual’s employment. Therefore, by the terms of the Act, that very freedom is restricted. In order to protect and promote the collective bargaining process the Legislature has provided that no employer is free to affect a person’s job security or conditions of employment when the employer’s action is prompted by an anti-union motive, (e.g. section 58 [now 66] of the Act). For the same reason, by virtue of the Act, an employer’s freedom of expression regarding possible union representation of his employees is not absolute. While he is of course free to express his views of representation by a trade union he may not use that freedom of expression to make overt or subtle threats or promises motivated by anti-union senti-

ment which go to the sensitive area of changes in conditions of employment or job security.

26. A mere expression by the employer of its preference to remain non-union will not violate section 64, as the Board noted in *Playtex Ltd.*, [1972] OLRB Rep. Dec. 1027 (at 5):

Apart from any electioneering or propaganda published by an employer, it is to be assumed that employees recognize that the employer is not usually in favour of having to deal with the employees through a trade union. Accordingly, it ought not to be a surprise to the employees when the employer indicates that he would like to have the employees vote against the trade union. An invitation to employees to vote against the trade union delivered in writing in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statement cannot be characterized as undue influence within the meaning of section 56 [now section 64] of the Act. Indeed, employees might consider the fact that the employer is opposed to dealing with them through a trade union as evidence of the fact that union representation would work to the detriment of the employer and to the advantage of the employees. The mere expression of the employer's opinion in such matter, standing alone, is protected by the provisions of section 56 of the Act. The only prohibition on the employer when expressing his views is that such expression of views do not constitute or are not coupled with coercion, intimidation, threats, promises or undue influence.

Any suggestion that unionization will be accompanied by loss of jobs will, however, violate that section: *Dylex Limited*, [1977] OLRB Rep. June 357, *Viceroy Construction Company*, *supra*; *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1489.

27. Where the employer's message is that future enjoyment of current or previously promised wages, working conditions or benefits is conditional on the outcome of a representation vote, this also constitutes undue influence: *Gestetner (Canada) Limited*, [1971] OLRB Rep. Feb. 62; *J. E. Martel & Sons Limited*, [1972] OLRB Rep. Aug. 811; *Hostess Food Products Limited*, [1975] OLRB Rep. March 218.

See also *Vogue Brassiere Incorporated*, [1983] OLRB Rep. Oct. 1737, and the numerous authorities referred to in paragraphs 26 to 43 of that decision.

38. In the instant case, the respondent, through Ms. Wilkinson and Mr. Binions, went well beyond the freedom of expression reserved to an employer by section 64 of the Act. As noted above, at a "rap session" held in June of 1985, Ms. Wilkinson, who was well aware by that time that the union was attempting to organize the respondent's employees, told employees that if a union came in, there would be staff reductions. At the aforementioned student meeting, Ms. Wilkinson linked with unionization the layoff of all of the respondent's students. In meeting with employees to explain the staff reduction "experiment", Ms. Wilkinson told them that if the union came in, they would lose some of their existing privileges, including privileges they didn't even know they had. One of the examples cited by Ms. Wilkinson of privileges that would be lost if the home were unionized was the employees' privilege of taking off time when they wished, by taking vacations and leaves of absence up to five times a year. She also hinted that employees might lose the privilege of working exclusively on a particular shift. During those meetings, Ms. Wilkinson again linked staff reductions with unionization, as did Mr. Binions when he met with the staff following the "experiment". Although employees had previously heard Ms. Wilkinson link large wage increases with staff reductions during her annual early April wage discussions, those discussions had not occurred in the context of a union organizational campaign or in the context of an "experiment" in which specific individuals were removed from the schedule in order to give employees a taste of what in Ms. Wilkinson's view it would be like to work with a union in the home.

39. As noted above, it is clear from the totality of the evidence that Ms. Wilkinson is an experienced and competent administrator who had the trust and the respect of her staff. It is also evident that statements concerning the effect of unionization on existing working conditions and staffing levels caused great concern among the staff. For example, Ms. Wilkinson's comments led Ms. DeGeer to form such an unfavourable view of the union that she would only accept service of a summons by Mr. Rupke after he complied with her request that he provide her with a written assurance of assistance in gaining reinstatement in the event that she lost her job as a result of testifying.

40. Mr. Binions' words at the August 27 staff meetings also had a substantial impact on employees. He had never previously been present at a staff meeting. Ms. Wilkinson introduced him as a lawyer whose father owned Aurora Resthaven. Thus, employees naturally presumed that he spoke with considerable authority and knowledge. That presumption was no doubt enhanced by his description of the Board's certification procedures and his assertion that the employer had the right to separate full-time and part-time bargaining units. Having emphasized that all he could do was give them "facts", he proceeded to convey to them, in response to questions from employees, that unionization would lead to some of them losing their shares of the respondent's "wage pie". It is important to note that Mr. Binions' statements were made at a time when he had had no discussion whatsoever with the union concerning what its wage proposals would be. Indeed, having not yet obtained bargaining rights, the union had not had occasion to meet with employees to formulate such proposals. Although during the union's organizing campaign reference had been made to increased wages being one of the possible benefits of unionization, it cannot be taken to be a foregone conclusion that the employees, who had always previously opted for a smaller wage increase in order to assure the maintenance of existing staff levels, would request CLAC to seek through negotiations or interest arbitration a wage increase of such magnitude as would necessitate staff reductions, or that CLAC would, notwithstanding section 68 of the Act, attempt to obtain such an increase in the absence of a mandate from the respondent's employees in that regard. Moreover, the respondent made a profit in 1985 and, as conceded by Ms. Wilkinson in cross-examination, it would be possible (although not desirable from the respondent's point of view) for the respondent to pay somewhat higher wages without cutting staff by reducing its profit level or some of its management salaries. It might also be possible for the respondent to obtain additional Government funding on the basis of an increased wage burden.

41. Under the circumstances, we do not accept that the statements made by Ms. Wilkinson and Mr. Binions can legitimately be characterized as "factual". While they were undoubtedly an expression of the employer's views, they interfered with the employees' selection of a trade union and constituted "coercion, intimidation, threats, promises or undue influence" within the meaning of section 64 of the Act. As contended by union counsel, they also support a finding that the respondent has contravened sections 66 and 70 of the Act, as do Ms. Wilkinson's aforementioned statements about loss of privileges and about students being the first persons to be let go in the event of unionization.

42. Even if management's statements linking unionization with staff reductions and loss of privileges could somehow be justified as legitimate expressions of an employer's views in the context of the nursing home industry (which in our view they cannot), the aforementioned "experiment" conducted by the respondent would nevertheless itself constitute a serious unfair labour practice. Although (as conceded by counsel for CLAC) the implementation of that temporary reduction in staff hours did not contravene section 79(2) of the Act as it was done before the respondent received notice of the certification application from the Board, it did contravene sections 64 and 66 of the Act. While Ms. Wilkinson initially attempted to lead us to believe that the "experiment" was merely designed to determine if the respondent's staff could cope with reduced staff-

ing, it is clear from the totality of the evidence that the “experiment” was intended to discourage employees from unionizing by giving them a taste of what Ms. Wilkinson thought it would be like to work at Aurora Resthaven if the union gained bargaining rights. As noted above, the experiment was implemented without any knowledge of what CLAC’s demands would be if it were certified to represent the respondent’s employees. Moreover, staffing levels were reduced below the levels that were in place at the respondent’s two unionized homes. Short of terminating the employment of union supporters, it is difficult to conceive of an approach more likely to interfere with the selection of a trade union and to compel employees to refrain from becoming or continuing to be union members, or to refrain from exercising other employee rights under the *Labour Relations Act*.

43. In view of the aforementioned serious contraventions of the Act which we have found on the part of the respondent, we find it unnecessary to determine whether the respondent, through Ms. Wilkinson, further contravened the Act by posting the notice to employees concerning “visits from other than Aurora Resthaven”.

44. We turn next to a consideration of CLAC’s application for certification under section 8 of the Act. As has been noted by the Board in many cases, certification can be granted under that section only if three conditions are satisfied:

- (1) the respondent must have contravened the Act;
- (2) the contravention(s) must have resulted in a situation in which the true wishes of the employees are not likely to be ascertained by a representation vote; and
- (3) the applicant must have membership support that, in the opinion of the Board, is adequate for the purposes of collective bargaining.

45. As indicated above, the respondent has contravened sections 64, 66, and 70 of the Act. Those contraventions consist of statements and actions which expressly or impliedly indicated to employees that unionization would lead to layoffs, loss of existing employee privileges, and a significant deterioration in working conditions due to the need to perform the same body of work with fewer staff. Viewed objectively, the employer’s unlawful conduct has created a situation in which it is highly unlikely that a representation vote would disclose the employees’ true wishes as to whether they desire to be represented by the union in collective bargaining. In *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, the Board, in granting certification under what is now section 8 of the Act, found that the employer’s activities had likely “transformed the issue in the minds of employees on which employees would be asked to vote in a representation election from one of ‘do you wish to be represented in collective bargaining by the applicant’ to one of ‘do you want continued full and steady employment’.” In the instant case, the respondent’s contraventions of the Act have in all probability transformed that issue in the minds of the respondent’s employees to “do you want to have layoffs, lose existing privileges, and work under conditions similar to those experienced during the August 26 ‘experiment’?” As stated by the Board in *Brinks Canada Limited*, [1982] OLRB Rep. Aug. 1140, “[w]hen an employer makes a threat which effectively tells an employee that to choose a union is tantamount to choosing unemployment, the ability of the employee to exercise any free choice is obviously removed”. (See also *Wilco Canada Inc.*, [1983] OLRB Rep. June 989; *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189; and the cases referred to in those decisions.) That statement is particularly applicable to the respondent’s students, who were led to believe by Ms. Wilkinson that they would be “the first people to be let go” if the union gained bargaining rights. However, it also applies to the respondent’s other employees who through management’s statements and through

the aforementioned “experiment” were given to believe that unionization would lead to substantial reductions in the respondent’s work force. Accordingly, we find that the respondent’s contraventions of the Act have resulted in a situation in which the true wishes of the employees are not likely to be ascertained by a representation vote. In this regard, we find no merit in the argument presented by counsel for the respondent that any harm that may have been done by her client’s activities was rectified by Mr. Rupke’s letter of September 4, 1986, or by the time that has elapsed since the events in question. We are also unpersuaded that a remedial order under section 89 of the Act would create an environment in which the true wishes of the employees would likely be ascertainable through a representation vote.

46. Does CLAC have membership support that is adequate for the purposes of collective bargaining? In support of her contention that it does, union counsel referred us to the factors set forth by the Board in *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848, at paragraph 21:

The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated at paragraph 22:

No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard for all the circumstances.

Some of the circumstances or factors which have been considered by the Board in assessing “adequacy” are:

- (1) the stage of the union’s campaign at which the employer conduct occurred (*Skyline Hotel Limited*, [1980] OLRB Rep. Dec. 1811; *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. Apr. 269);
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed (*Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972 and; *Windsor Airline Limousine Limited*, [1981] OLRB Rep. Mar. 398);
- (4) the severity of the employer conduct insofar as it related to the number of cards signed - “the chilling effect” (*K-Mart*, [1981] OLRB Rep. Jan. 60);
- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Somerville Belkin*, [1980] OLRB Rep. May 796).

In assessing adequacy the Board must engage in some measure of speculation regarding the union’s prospects of successfully engaging in the sequel to certification, collective bargaining. If the union can and has mustered the totality of its support in the bargaining unit certification under section 8 should not be used to force union representation on those employees who would not have chosen this freely for themselves. The assessment must be taken with care (see *Skyline*, *supra*, at paragraph 62).

47. It appears from the timing of the reports which Ms. Wilkinson received from employees concerning the union “visitor”, and from the dates on the membership cards filed by CLAC in support of this application, that its organizational activities in respect of the respondent’s employees commenced in May of 1985. Several cards were signed during the last week of that month, with

many more being signed in the first week of June. After that, it appears that signatures became harder to come by. Although some cards were signed during the balance of June and during the month of July, it was not until mid August that the campaign regained some momentum. However, only two additional cards were signed after the “experiment” had been announced: one on August 24 and one on September 3. Thus, it is apparent that the respondent’s initial unfair labour practice occurred early in the union’s organizing campaign and, in all probability, slowed its early momentum. Moreover, the unlawful “experiment”, and the unlawful statements which surrounded it, occurred during a period in which the campaign had regained some momentum. However, after the “experiment” had been announced, that momentum vanished. Whether more than the two employees who signed membership cards after August 23 would have joined the union if the “experiment” had not been carried out, and if Ms. Wilkinson or Mr. Binions had not made the aforementioned unlawful statements, is a matter which the respondent’s contraventions of the Act have made it difficult, if not impossible, to determine with any degree of accuracy. The fact that the union filed its application with the Board on August 22, 1985 is not determinative of that matter, since union officials would undoubtedly be aware that they could continue to gather membership up to and including the terminal date.

48. Notwithstanding a number of serious contraventions of the Act by the respondent, CLAC succeeded in signing up over 47% of the employees in bargaining unit #1 as members. Having regard to all of the circumstances, we are of the opinion that CLAC has membership support that is adequate for collective bargaining in that bargaining unit. We are also satisfied that the same is true of bargaining unit #2. Although the respondent was less successful in rallying employee support in that unit, it did sign up over 40% of them, despite Ms. Wilkinson’s assertion that if the home were unionized students (who made up over 40% of that bargaining unit as of the date of this application) would be the first people to be let go.

49. The following reasoning from the Board’s decision in *Robin Hood Multifoods, supra*, is also applicable in the present case:

64. Although the applicant’s membership support in the part-time bargaining unit is only slightly over 35%, the fact that the applicant has membership support of almost 50% in the full-time bargaining unit gives it a strong presence in the work place generally. Accordingly, the 36.4% of the employees in the bargaining unit will not stand alone since they will gain considerable support from the union’s presence among the full-time employees. (See *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398, in which the Board, in forming its opinion that membership support of 29.6% in the owner-operators bargaining unit was adequate for collective bargaining within the meaning of section 7a, took into consideration the fact that the unions membership support of almost 50% in the driver’s bargaining unit gave it “a strong presence in the work place generally”.) Thus, it appears to the Board that the applicant has a core of support in bargaining unit #2 sufficient to negotiate with the employer.

50. Thus, we are satisfied that all of the prerequisites of section 8 have been satisfied, and that this is an appropriate case in which to exercise our discretion under that provision to certify the applicant in respect of bargaining units #1 and #2.

51. The relief requested by the union under section 89 of the Act is that the Board order the respondent to cease and desist from any further violations of the Act and apologize to the employees affected. While we are not prepared to direct the respondent to apologize, as to do so might constitute an unwarranted interference with the employer’s freedom of expression, we will follow the normal course of directing the respondent to post a notice in conspicuous places in the work place to advise employees of this decision and of their rights under the Act, in an attempt to remedy at least to some degree the adverse psychological impact of the respondent’s contraven-

tions of the Act (see *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449, and *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254).

52. For the foregoing reasons, the Board, in the exercise of its remedial discretion under section 89(4) of the Labour Relations Act, hereby directs that the respondent:

- (1) cease and desist from breaching sections 64, 66, and 70 of the *Labour Relations Act*; and
- (2) post copies of the attached notice marked "Appendix", after being duly signed by an authorized representative of the respondent in conspicuous places on its premises where they are likely to come to the attention of bargaining unit employees, and keep them posted for sixty consecutive working days. Reasonable steps shall be taken by management to ensure that the notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the Christian Labour Association of Canada so that it can satisfy itself that this posting requirement is being complied with.

53. Pursuant to section 8 of the Act, certificates will issue to the union for the following bargaining units:

BARGAINING UNIT #1

All employees of the respondent at Aurora, save and except department heads and co-ordinator, persons above the rank of department head and co-ordinator, registered and graduate nurses, office and clerical staff, paramedical personnel, chaplains, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

BARGAINING UNIT #2

All employees of the respondent at Aurora regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads and co-ordinator, persons above the rank of department head and co-ordinator, registered and graduate nurses, office and clerical staff, paramedical personnel and chaplains.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE, THE CHRISTIAN LABOUR ASSOCIATION OF CANADA, AND THE OBJECTING EMPLOYEES PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY STATING THAT UNIONIZATION WOULD LEAD TO STAFF REDUCTIONS AND LOSS OF EXISTING EMPLOYEE PRIVILEGES, AND BY CONDUCTING THE STAFF REDUCTION "EXPERIMENT" DESCRIBED IN THE BOARD'S DECISION.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES
OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT LAYOFF EMPLOYEES, DEPRIVE THEM OF ANY EXISTING PRIVILEGES,
OR OTHERWISE PENALIZE ANY OF THEM BECAUSE THEY HAVE SELECTED THE
CHRISTIAN LABOUR ASSOCIATION OF CANADA AS THEIR BARGAINING AGENT, OR
EXERCISED ANY OTHER RIGHTS UNDER THE ACT.

CEBY MANAGEMENT LIMITED OPERATING
AS AURORA RESTHAVEN EXTENDED CARE &
CONVALESCENT CENTRE

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 23RD day of JULY, 19 86 .

0022-86-R Canadian Paperworkers Union, Applicant, v. Belkin Inc., Respondent

Bargaining Unit - Whether bargaining unit should be confined to a particular division of the employer - Board's practice in placing geographic limitations on the appropriate bargaining unit

BEFORE: *Robert D. Howe*, Vice-Chairman and Board Members *J. A. Ronson* and *R. Montague*.

DECISION OF ROBERT D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER R. MONTAGUE; August 11, 1986

1. In a decision dated May 7, 1986 in respect of this application for certification, the Board wrote, in part, as follows:

4. The parties are in partial agreement concerning the description and composition of the bargaining unit. The language to which they have agreed is "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." The respondent contends that the unit should be confined to all employees of the respondent "in its Corrugated Division" in the Municipality of Metropolitan Toronto, but the applicant opposes the addition of those words to the bargaining unit description.

5. Since the applicant's right to certification cannot be affected by the Board's ultimate decision concerning that matter, the parties have requested the Board to certify the applicant on an interim basis for the bargaining unit proposed by the respondent and to subsequently resolve the issue remaining in dispute between them on the basis of written submissions. In this regard, the respondent has agreed to file its initial submissions by May 9, 1986, the applicant has agreed to file its submissions by May 16, 1986 and the respondent has agreed to file its reply submissions by May 23, 1986.

2. Those written submissions indicate that the respondent has five divisions: Belkin Paperboard, Belkin Corrugated, Belkin Paperstock, Keystone Business Forms, and Pioneer Envelopes. The respondent has a collective agreement in Metropolitan Toronto with Local 1112 of the applicant in respect of its Belkin Paperboard Division. The exclusions from that collective agreement differ from those to which the parties have agreed in the instant case; the exclusions from the Belkin Paperboard Division bargaining unit are "supervisors, persons above the rank of supervisor, regularly assigned watchmen and all employees engaged in administration, sales, accounting, clerical, stenographic or other office work and probationary employees."

3. In Board File No. 0497-84-R which is pending before another panel of the Board, the present applicant, and its Locals 36, 311, and 1112, contend, among other things, that the respondent and Somerville Belkin Industries Limited ("Somerville Belkin") should be treated as one employer for the purposes of the *Labour Relations Act*. Somerville Belkin has a collective agreement in Metropolitan Toronto with Local 36 of the applicant. The exclusions in that collective agreement also differ from those to which the parties have agreed in the instant case. Somerville Belkin also has a Merchandising Services Division within Metropolitan Toronto, which is non-union.

4. As noted above, it is the respondent's position that the bargaining unit in the present case should be confined to employees in its Corrugated Division. In support of that position, the respondent contends that the dissimilar exclusions in its aforementioned collective agreement with Local 1112 of the applicant would be included in the bargaining unit unless it is confined to employees in the respondent's Corrugated Division. The respondent further contends that if the applicant's aforementioned application under section 1(4) succeeds, the dissimilar exclusions in

Somerville Belkin's collective agreement with Local 36 would also be included in the bargaining unit in the present case unless it is so restricted, as would employees in Somerville Belkin's Merchandising Services Division. Respondent's counsel referred to the Board's unreported decision dated January 30, 1984 concerning *Indal Limited* (Board File No. 2336-83-R) in further support of his client's position. However, that decision is not of assistance in determining the issue before us since in that case the parties were in agreement that the bargaining unit should be confined to employees in a particular division of the employer. Thus, in that case the Board relied upon the agreement of the parties in finding that unit to be appropriate for purposes of collective bargaining. The undisputed fact that the bargaining unit proposed by the respondent in the instant case was agreed to in an earlier application which was withdrawn by the applicant is also not of assistance in deciding the issue which remains in dispute before us.

5. In support of his client's position, counsel for the applicant referred the Board to *Hunter Douglas Canada Limited*, [1985] OLRB Rep. Apr. 535. In that decision, the Board wrote, in part, as follows:

3. The parties are in agreement on the description of the bargaining unit appropriate for collective bargaining with the exception of a difference on whether the bargaining unit ought to be described with reference to in the City of Mississauga or with reference to in its Architectural and Window Covering Products Division in the City of Mississauga. It is the position of the applicant that the bargaining unit ought to be defined with reference to the City of Mississauga. It is the position of the respondent that the bargaining unit ought to be defined with reference to the named Division.

4. At the present time the respondent has only one facility in Mississauga. However, the respondent stated that while it had no plans to put in a new division in Mississauga, it could put another division in Mississauga. The respondent is a large Canadian organization which has three other divisions in addition to the division which is affected by this application. Other divisions of the respondent have operations in the greater Metropolitan Toronto area.

5. The Board's practice with respect to defining the geographic boundaries of appropriate bargaining units and ensuring the stability of bargaining rights was set forth in *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293 at page 295, where the Board stated:

6. The Board in *Wix Corp Ltd.*, [1975] OLRB Rep. Aug. 637 canvassed in some detail the Board's practice with respect to defining geographic limitations in the appropriate bargaining unit. Apart from the construction and perhaps certain service industries, the Board's policy, where the employer has employees at only one location within a municipal area, is to describe the bargaining unit in terms of the municipality itself (*Perimeter Industries Limited*, [1973] OLRB Rep. March 174). On occasion the Board will expand its definition of the bargaining unit to encompass an area greater than a single municipality (see *The Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. Feb. 1178; *The Adams Furniture Company Limited*, [1975] OLRB Rep. June 491; and note as well the Board's normal unit of the Municipality of Metropolitan Toronto), but is reluctant to do so in the absence of compelling reasons (*Wittich's Bread Limited*, [1969] OLRB Rep. Jan. 1019; *Del Zotto*, [1972] OLRB Rep. June 637 and *Canada Safeway Limited*, [1972] OLRB Rep. Mar. 262). The primary reason for this policy of municipality-wide bargaining units is the Board's concern for stability of bargaining rights; i.e. the union's bargaining rights will not be affected by a subsequent move of the employer's operation to some other location within the same municipality. On the other hand, actual accretions to the employer's operations within the municipality, such as a second or third plant, will automatically be covered by the union's certificate. To this latter extent the right of self-determination of a bargaining agent by the employees at these new locations is compromised, in favour of the over-riding concern for stability of bargaining rights.

6. In the instant application the respondent has one facility in Mississauga and has no plans for any subsequent facilities in Mississauga. The arguments of the respondent based upon any

future facilities in Mississauga are based upon hypothetical facts and are therefore purely speculative in nature. While section 3 of the Act does state that every person is free to join a trade union of his own choice and to participate in its lawful activities, it ought not to be read in isolation. Section 3 is to be applied to the facts in this application. On the one hand the interests of present employees who have indicated they wish to be represented by the applicant are to be considered and on the other hand there are the highly speculative interests of future persons who may or who may not become employees of the respondent in Mississauga. As the Board stated in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, nowhere is the balancing of the statutory objectives more evident than in the Board's normal practice of circumscribing the geographic scope of bargaining rights by reference to the municipal boundary within which an employer operates.

7. In balancing the interests of present employees against the possible interests of unforeseen future employees, the balance is struck in favour of addressing the interests of present employees in the stability of their bargaining relationship with the respondent. With respect to the respondent's arguments that the appropriate bargaining unit be defined with respect to one of its divisions, the Board is not persuaded that its arguments have any merit. The respondent acknowledges that the bargaining unit ought to be described without reference to a municipal address in the interests of stability of bargaining rights while arguing for the reference to one of its divisions in defining the appropriate bargaining unit.

8. In our view, the arguments of the respondent must fail. The inclusion of a reference to a division of the respondent in the appropriate bargaining unit is a destabilizing factor in bargaining rights. It is arguably open to the respondent to change its internal corporate structure and change and/or substitute a different division in its present premises in Mississauga. It is arguably even easier to effect a change in the internal corporate structure of the respondent than it is to relocate to a new address in Mississauga. For these reasons the appropriate bargaining unit is to be described without reference to a division of the respondent in the City of Mississauga.

6. We respectfully agree with that reasoning and find the labour relations policy considerations described therein to be equally applicable in the present case. However, to avoid any possibility of sweeping into the bargaining unit employees of the respondent in its Belkin Paperboard Division who are excluded from the aforementioned Metropolitan Toronto collective agreement between the respondent and Local 1112 of the applicant, the bargaining unit description in the present case will expressly exclude persons employed by the respondent in that division. Since the bargaining unit in the instant case is confined to employees of the respondent, it is unnecessary to expressly exclude employees of Somerville Belkin. Whether the granting of a declaration in the aforementioned section 1(4) application will result in any employees of Somerville Belkin falling within the scope of that bargaining unit and, if so, whether it is appropriate to grant such a declaration, are matters which in our view may appropriately be left for determination (if necessary) by the panel of the Board hearing that application.

7. For the foregoing reasons, the Board finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons employed by the respondent in its Belkin Paperboard Division, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in that bargaining unit at the time the application was made were members of the applicant on April 24, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

9. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. If the intent of the majority award is to further the interests of collective bargaining and harmonious labour relations, then the *ratio* is difficult to understand. It is easily understandable if the intent is to lock all future employees of the employer in Metro Toronto within the embrace of the union.
 2. In the past the parties agreed to certification by reference to the divisional set-up of the employer. Probable reasons come immediately to mind:
 - (a) there is no community of interest between the divisions;
 - (b) the union was able to organize only one divisional plant in Metro Toronto.
 3. Now the union wishes to retreat from a long established procedure. Having organized all the employer's plants in Metro Toronto, it wants a description that will cover all future operations by the employer in Metro. The reason for the request is that the union wishes to prevent the employer from moving work from union plants to new divisions. One wonders what s.1(4) of the Act is designated to prevent?
 4. Despite the past agreement of the parties, the majority accede to the union's request by applying Board "policy". The problems that arise with the pre-existing unit are conveniently dealt with by "carving out" that unit. So much for the logic of the expressed "policy".
 5. Now, within Metro Toronto, all the various enterprises of the employer come within the ambit of the certification description. Paperboard, corrugated paper, paperstock, business forms and envelopes are dumped into the same pot. The community of interest between a corrugated paper plant and a business forms plant is not self-evident. And it is not now open to the employer to make the argument if it wishes to open a business forms plant in Metro Toronto.
 6. The union's gain is Metro Toronto's loss. A future decision to open new plant(s) in Mississauga, Markham, Barrie or Hamilton is understandable. That will leave open the community of interest problem, quite apart from leaving it to the new employees themselves to decide if they wish the union as their bargaining agent. Or, even worse, the employer may set up a new legal entity to open a business forms plant in Metro, await the union's application under s.1(4), and let the Board sort out the problem that it created.
 7. The words "in its corrugated division" should be included in the unit description.
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0753-86-U Employees of Cara Operations Limited Flight Kitchens #1 and #2 Malton, Complainants, v. The Hotel Employees, Restaurant Employees Union, Local 75 of the Hotel Employees, Restaurant Employees International Union A.F.L. - C.I.O. C.L.C. O.F.L. and Cara Operations Limited, Respondents

Duty of Fair Representation - Ratification and Strike Votes - Unfair Labour Practice - Employer soliciting employees to ratify memorandum of settlement - Union acquiescence in employer's conduct - Whether collusion - Whether ratification vote conducted fairly - Whether prima facie case - Board commenting on potential consequence of remedy sought to set aside collective agreement and direct new ratification vote

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *J. Wilson* and *R. Montague*.

APPEARANCES: *C.J. Abbass* and *William Lal* for the complainants; *Alick Ryder* and *George Pineo* for the respondent union; *Brian O'Byrne* and *Frank Charron* for the respondent employer.

DECISION OF THE BOARD; August 7, 1986

1. This is a complaint under section 89 of the *Labour Relations Act*. Bill Lal, acting on his own behalf, and on behalf of a number of other employees, complains that the company and the union have both contravened the *Labour Relations Act*. The company and the union (initially) deny that there has been any breach of the law, and argue, further, that this complaint does not even disclose a *prima facie* case. The union and the company argue that even if all of the allegations are true, they would not establish a contravention of the *Labour Relations Act*. In addition, the company contends that the complainants did not act with reasonable dispatch in filing this complaint. All of the events complained of preceded March 14, 1986, but this complaint was not filed until June 16, 1986. In the meantime, the union and the employer have signed a collective agreement (which the complainants seek to set aside), the company has implemented substantial wage increases for all employees, the company has paid retroactive wage payments in the order of two hundred thousand dollars, and a number of employees have taken the benefit of the new health and welfare plan which the complainants say is inadequate.

2. We do not think that there is any merit to the timeliness argument. Mr. Lal and the others did move reasonably quickly to put their concerns to the Board, both by filing a termination application and subsequently filing the present complaint. The fact that the collective agreement they now attack has been fully implemented may well be a factor to be taken into account in deciding whether this Board should set it aside as the complainants urge the Board to do; but that is a question of remedy which would ordinarily only be dealt with after hearing the merits of the case.

3. The claim that there is no *prima facie* case is a more difficult one and requires a brief outline of Mr. Lal's allegations. We should make it clear, however, that the initial question before us is *not* whether what he alleges is, in fact, true. In order to determine whether those allegations make out a *prima facie* case, warranting a hearing, the Board must *assume* that everything he asserts is true, then consider whether he has an arguable case. It may well be that none of the assertions are true or can be proved. But that is not the point. Initially, we need only determine whether there is sufficient *possible* substance to those allegations to warrant giving Mr. Lal and the others an opportunity to prove them.

4. On February 17, 1986, the union and the employer concluded negotiations for a new collective agreement. The agreement included a wage increase of approximately six per cent, fur-

ther increases in each of the next two years, and a new health and welfare plan. The memorandum of settlement with the proposed changes was signed by all members of the union negotiating committee, including Mr. Lal. The terms of the settlement included an undertaking that all members of the negotiating committee would unanimously recommend the settlement to the employees. A ratification vote was scheduled for February 24, 1986.

5. On February 24, 1986, the employees voted to reject the proposed settlement. On March 3, 1986, the Minister of Labour advised the union and the employer that he did not consider it advisable to appoint a conciliation board. Accordingly, the "count down" began, and a lawful strike could commence as early as the third week in March.

6. On March 6, 1986, the company filed an unfair labour practice complaint against the union (Board File No. 2987-85-U) alleging that union representatives had contravened section 15 of the Act. The complaint alleged that between February 17th and February 24th, the date of the ratification vote, Mr. Lal, and others, had been actively lobbying employees to vote against the settlement - despite the fact that he and other union representatives had undertaken, in writing, to unanimously recommend its acceptance. We need not decide, at this stage, whether or not those allegations are true (although it is interesting to note that the termination application filed by Mr. Lal and before us concurrently, includes a written statement bearing Mr. Lal's signature which suggests that as early as February 20 - four days before the ratification vote, he may have been mobilizing opposition to the union). It suffices to say that if the employer had been able to prove its allegations it would have a strong case for a breach of section 15 of the Act. In any event, the union and the employer settled that complaint on the basis that there would be a new ratification vote. The vote was scheduled for March 14, 1986, and would take place on company premises, during working hours, in order to make it as easy as possible for employees to vote and to ensure that as many as possible did so.

7. The company concedes that it was actively interested in "selling the settlement" to the employees in the bargaining unit. The company argues that it was entitled to do so - especially in light of what it asserts was a breach of the union's responsibility to whole-heartedly recommend it. The company notified all employees that if they wished to meet with company officials, in small groups, to discuss the settlement offer, company representatives would be present for that purpose in the cafeteria. A number of employees did attend such meetings which were held during working hours. In addition, the company provided vehicles to transport employees to the voting area at its main flight kitchen at the airport from its other flight kitchen about two miles away.

8. These were not the only steps taken by the company to promote a high voter turn out and the acceptance of the proposed settlement. The company also made it clear that if the settlement was not accepted the employees would have to go on strike if they wanted to improve it; moreover, the company indicated that if the employees did go on strike, the company would hire replacement workers as it was entitled to do under the law. The company had taken out newspaper ads to solicit applications for employment and there was a recruiting booth not too far away from the area where the employees were to cast their ballots for or against the settlement proposal. The union did not object to any of these steps taken by the company, but it must be remembered that the union remained under an obligation to unanimously recommend the settlement to the members of the bargaining unit and the agreement to hold a new ratification vote represented a settlement of the earlier unfair labour practice complaint.

9. The ratification vote was held on March 14, 1986 as scheduled. This time, 353 employees participated - about one hundred more employees than had cast ballots in the previous vote. This time, a significant majority of the employees voted in favour of the settlement. A formal col-

lective agreement was executed on March 25, 1986, and was signed by (among others) Bill Lal who now seeks to have the agreement set aside and have the Board direct a third ratification vote.

10. The complainants argue that the settlement of the earlier unfair labour practice complaint, permitting the new ratification vote, together with the union's acquiescence in the employer's active campaigning in favour of the settlement constitutes a form of "collusion" between the union and the employer, deliberately designed to reverse the result of the first ratification vote. The complainants contend (and the respondents deny) that there has never been a ratification vote on company premises before. Mr. Lal says that, although named in the company's unfair labour practice complaint, he was never interviewed about it, and only found out later about the settlement. The complaints further allege that a union official, J. G. Belanger "acted in an arbitrary manner and misrepresented the terms of the memorandum of settlement" in respect of the new health and welfare plan - although this position was modified somewhat in argument before us. Counsel for the complainants conceded that the complaint did not refer to any particular statement by Mr. Belanger that was untrue, inaccurate, or misleading. The complainants' position is that the discussion of this issue was so inadequate as to be tantamount to a misrepresentation, or an arbitrary treatment of an item critical to the employees' interests. Mr. Lal complains that "the President and Vice-President of the respondent union misrepresented to the employees the union's position on going on strike; the President, telling the employees on February 24, 1986, that if they rejected the memorandum of settlement they were going on strike on March 4, 1986, and the Vice-President telling them on March 3, 1986 that they were not". Mr. Lal also complains that management and union officials (none of whom are identified) spread rumours that he was going to be jailed because of the unfair labour practice charges in which he was named, with the intention of intimidating the employees to vote in favour of the memorandum of settlement. Finally, the complainants contend that there were irregularities in the taking of the second vote, and that, in particular, one person at least voted twice. It is said that these acts and omissions constitute breaches of sections 68 and 71(a) by the union, and 64 and 71(a) by the company.

11. The company argues that even if everything the complainants assert is true, the company has not breached the *Labour Relations Act*. It was entitled to file an unfair labour practice complaint to ensure that the union representatives lived up to their written undertaking. It was entitled to settle that complaint on the sensible basis that there should be a new ratification vote. It was entitled to urge the employees to accept the settlement, because section 64 of the Act guarantees employer free speech, and the union could not object because it too was obligated to unanimously recommend the settlement as a good one which should be accepted in the circumstances. The company was entitled to do what it could to make sure that as many voters turned out as possible, because the *Labour Relations Act* itself guarantees all employees the right to participate in a vote of that kind, and contemplates that the vote should be conducted in such a manner that those entitled to vote would have an ample opportunity to cast their ballots. The company asks: how can it be illegal to make it as easy as possible for employees to vote? The company notes that representation votes are conducted on the employer's premises for precisely that reason. Finally, the company maintains that it was entitled to tell employees that if they rejected the settlement they would have to go on strike to improve it and, if the union called a strike, the company intended to hire strike replacements. The company points out that a strike or lockout is a legitimate bargaining tool in this province and further that, it is entirely lawful for a company to hire temporary replacements as a means of securing a collective agreement on its own terms. The company asks: how can it be illegal to advise employees that, in the company's view, the proposed settlement is a "good deal", or to warn them, in advance, of the potential consequences if they rejected the employer's last offer? Indeed, it would be irresponsible to do otherwise.

12. For its part, the union concedes that certain of the complainants' allegations (misrepre-

sentation, voting irregularities) if proved to be intentional, *might* constitute a breach of section 68 of the Act - although the union does not concede that it was "in bed with the company", or that it acted in any way improperly. The union's position is that the settlement was a reasonable one in light of current collective bargaining realities and settlements elsewhere. The union declares that it is quite content to have Mr. Lal's complaints aired because it is confident that the only improper conduct which will be disclosed by the evidence is that of Mr. Lal himself and perhaps some of his supporters.

13. What should the Board make of these arguments? In the first place, it is clear that under section 71 of the Rules, the Board has a *discretion* whether to dismiss a complaint without a hearing. Secondly, it is clear that there must be a hearing into Mr. Lal's complaints against the union and that the company will necessarily be a party to those proceedings. Not only are the allegations against the union (collusion, etc.) intimately related to those against the company, but the remedy which is sought - setting aside the collective agreement - obviously affects the company. To the extent that the case involves a scheme to thwart the employees' wishes, motive may be relevant, and may require the Board to hear evidence of the union's conduct which does not, in itself, constitute a breach of the Act. Thus, even if there was nothing improper in what the company did, it would still be embroiled in a proceeding where the evidence would be virtually the same as would be the case if it were actually called upon to defend its position. In other words, even if the company is entirely innocent of any wrongdoing, the company would still remain fully involved in this case, adverse in interest to the complainants. Moreover, it would be troublesome if we dismissed the complaint, at this stage, only to have something come out later in the course of the proceeding which would require a reconsideration of that decision. In the circumstances, we do not think that it would be appropriate to exercise our discretion under section 71 to dismiss the complaint against the company, nor to express any opinion about whether, in our view, the complainants have made out a *prima facie* case.

14. We wish to make some final comments on the potential consequences of, and remedy sought in this case.

15. As we have already noted, the collective agreement has been signed. The company has implemented the fifty cents per hour wage increase and has paid out over two hundred thousand dollars to employees in retroactive wage payments. The company has also implemented a new health and welfare plan, and some employees have received disability or other payments under that plan.

16. Mr. Lal and the other complainants want that agreement set aside. They want a new ratification vote. If they are successful, the immediate result could be the termination of the wage increase which the employees are currently receiving and an end to any benefits payable under the challenged collective agreement. Persons receiving health and welfare benefits under the new plan might no longer be entitled to receive them. If the new (third) ratification vote turns down the company's proposal, the union would have to return to the bargaining table to seek improvements, and the company has indicated that it is not prepared to make any further concessions and intends to hire replacement workers if the employees go on strike. It is not clear whether the employees in the bargaining unit would have any obligation to pay back the retroactive pay which they have received under the collective agreement which the complainants now say is invalid. Clearly they would not be entitled to the wage increases or other benefits or protections which that agreement provided. Nor is it clear that the complainants can challenge the agreement, yet at the same time retain the retroactive wages paid to them, and continue to receive the wage increases which the agreement provides. All of these are issues which go to or flow from the remedy the complainants seek.

17. Given the rather unique circumstances of this case and the fact that one of Mr. Lal's complaints is that he and the other employees were not fully informed of the disposition of the earlier unfair labour practice complaint, the Board hereby records the parties' agreement that this decision be posted on the employer's premises for the information of employees potentially affected.

18. Pursuant to section 89 of the Act, a Board Officer is hereby appointed to meet with the parties in an effort to resolve this matter. If s/he is unsuccessful, the case can be rescheduled. This panel is not seized.

1296-82-U; 0195-83-U Luciano D'Alessandro and Donato Marinaro, Complainants, v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents

Damages - Duty of Fair Referral - Unfair Labour Practice - Whether Formula in *Portiss* to be used to quantify damages flowing from s.69 breach - Complainants would have fared better than average union member but for s.69 breach - *Portiss* Formula modified to reflect circumstances of case

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *F. W. Murray* and *W. F. Rutherford*.

APPEARANCES: *Ed J. Brogden* for the complainants; *A. M. Minsky, Q.C.*, and *Robert Leone* for the respondents.

DECISION OF ROBERT D. HOWE, VICE-CHAIRMAN AND BOARD MEMBER F. W. MURRAY; July 30, 1986

1. In a decision dated December 11, 1985 in respect of these consolidated complaints under section 89 of the *Labour Relations Act* [now reported, [1985] OLRB Rep. Dec. 1708], the Board found that the respondent Labourers' International Union of North America, Local 1089 (the "Union"), contravened section 69 of the Act in respect of three of the six referrals impugned by the complainant Luciano D'Alessandro, and in respect of twenty-three of the numerous referrals impugned by the complainant Donato Marinaro, and ordered the union to compensate the complainants for their respective wage and benefit losses. The Board remained seized for the purpose of dealing with any issues that might arise concerning the quantification of that order.

2. Since the parties have been unable to reach agreement concerning quantification of that order notwithstanding the appointment of a Board Officer to facilitate their efforts in that regard, a further hearing was held by the Board in Sarnia on May 28 and 29, 1986, for the purpose of hearing the evidence and submissions of the parties concerning that matter. Written proposals concerning "computation of damages" were filed with the Board at that hearing by counsel for the complainants and, on the agreement of the parties, were treated as his argument in chief. Opposing counsel then responded by means of oral argument. Written reply argument was subsequently filed by complainants' counsel, with leave of the Board, as were written submissions from respondents' counsel and complainants' counsel concerning the former's contention that the latter had exceeded the proper scope of reply argument.

3. In *Joe Portiss*, [1983] OLRB Rep. Sept. 1554, an earlier case involving the same Union and some of the same referrals, another panel of the Board wrote, in part, as follows in assessing the wages and benefits lost by Mr. Portiss (who served as an advisor to complainants' counsel in the instant proceedings) as a result of the contraventions of section 69 that were established in that section 89 complaint (see *Joe Portiss*, [1983] OLRB Rep. July 1160):

7. We consider the arguments of the parties in turn. Mr. Portiss submits that his compensation should be calculated by paying him at the rate of \$13.78 per hour for 72 working days lost between January 9 and April 14, 1981. That yields a sum of \$7,927.28 to which he adds interest calculated at 12%. He submits that the resulting amounts are the earnings of which he was deprived in 1981. Subsequently Mr. Portiss was awarded a 10% permanent disability pension, the benefits of which may be paid to him for life, based on his earnings for 1981 as calculated under the Workmen's Compensation Act, R.S.O. 1980 c. 539, s. 43 as amended. He submits that his pension benefits are diminished because the base calculation was made on a diminished wage figure attributable to the respondent union's violations of its duty to fairly provide him job referrals through its hiring hall. On that basis he maintains that he should be awarded 10% of the earnings and interest he would have received multiplied by 43, representing a projected period of 43 years of disability, until he reaches the age of 75. With some admitted discrepancies in the calculation of interest, Mr. Portiss originally computed the amount owing following that approach to be \$47,046.53.

8. The union submitted a number of alternative means of assessing Mr. Portiss' claim for compensation. Its first alternative is to take the average of earnings for 1981 of five members classified as "burners", the classification of labourer for which Mr. Portiss was registered and for which the Board found he was wrongfully deprived of referrals. The five burners chosen are those who were wrongfully referred over Mr. Portiss. Mr. Portiss earned \$10,928.22 in 1981. It is common ground that there were no violations of the Act affecting him in 1980. The average earnings for the five burners in 1981 is \$14,539.22. The union submits that Mr. Portiss should be paid the difference between that figure and his own actual earnings for the year, with deductions for unemployment insurance paid to Mr. Portiss as well as for a period of 19 days during which he was disabled and therefore unavailable for work. It also submits his award of compensation should be reduced by an amount of \$2,400.00 which it claims he would have earned but for having voluntarily quit a job at Combustion Engineering during the period in question. That calculation would leave Mr. Portiss with little or no compensation, as the deductions would virtually eliminate the difference between his actual earnings and the average calculated for the five burners.

9. Alternatively the union submits that the Board should follow the earnings of union member William Brain in 1981, a labourer who was referred out of turn ahead of Mr. Portiss in January and in whose shoes the union submits he would have been for the entire year but for the violations of the Act found by the Board. Brain's earnings totalled \$12,860.86. When the same deductions are applied to that figure Mr. Portiss, it is argued, is entitled to nothing.

10. As a third alternative the union submits that the comparison for Mr. Portiss be based on the wages for the year of Salvatore Gagliardi, the highest earner among the five burners who was referred work ahead of Mr. Portiss. Mr. Gagliardi earned \$17,064.25 in 1981. When the deductions listed above are applied to that figure, the union maintains that the difference between Mr. Gagliardi's earnings and Mr. Portiss' earnings is nothing.

11. A fourth alternative advanced by counsel for the union is based on a calculation of the estimated average earnings for the entire membership of Local 1089 for 1981. It is not disputed that the union's records show that in 1981, 1,185,187 hours were worked by the members of the local and that for the same period the average enrolment was 962 members. Assuming an hourly wage rate of \$14.31 per hour, which includes the hourly rate and vacation and statutory holiday pay, the average earning would be \$17,408.16. The union submits that that figure should be taken as a base for comparison with the actual earnings of Mr. Portiss, and it again submits that the deductions for unemployment insurance, the period of his disability, and his quitting Combustion Engineering would reduce the difference to no more than \$518.99, which it maintains is the maximum Mr. Portiss should be allowed to receive.

12. After careful consideration the Board does not accept any of the alternatives advanced by either Mr. Portiss or the union as the most reliable way of fairly assessing the amount of his compensation. Mr. Portiss' approach does not commend itself for a number of reasons. Firstly, it does not allow for the possibility that he may have earned more in 1981 because of the length or nature of the later referrals he did receive. Secondly, it is based on the assumption that he will live a certain number of years and will collect a pension for all of that time. As counsel for the union points out, the correct approach to that head of compensation would be to capitalize any projected loss to its present day value, by an actuarial calculation. Thirdly, and most significantly, it is not clear from the evidence before the Board that the Workers' Compensation Board did not assess his pension entitlement by reference to the average earnings of a person in his position, rather than by his actual earnings for 1981. It has the discretion to do so. Even if it did not, it would appear open to that tribunal to adjust Mr. Portiss' pension in light of any finding by this Board that his earnings for 1981 were diminished by the union's breaches of the *Labour Relations Act*. In our view, consideration of that question is best left to the Workers' Compensation Board.

13. The Board has equal concern with the alternative approaches advanced by the union. To compare Mr. Portiss to other members on a selective basis leaves much uncertainty. Determining the amount that an employee would have earned but for the wrongful application of fair hiring hall rules, is a speculative exercise at best. It cannot be said with any certainty that the complainant would have necessarily followed the pattern of employment for the entire year of any particular member referred ahead of him. Nor can there be any precise determination of whether he was in fact better off because a later referral might, for example, have brought him a longer assignment of a job with more overtime. When variables such as job shutdowns because of weather or loss of time due to accidents, illness, an employee's decision to quit and the time elapsed before he re-enters the hiring hall list are taken into account, it becomes virtually impossible to trace with any certainty the road not taken. In these circumstances we see little reliability in any formula for compensation that attempts to put the complainant in the shoes of any selected individual or group of members.

14. The Board recognizes that no formula is absolutely certain. It is satisfied, however, that the justice of the case is more likely to be assured by broadly determining the average earnings of the general membership of the local, and comparing them to the earnings of the complainant, with some allowance for his personal circumstances and his conduct, particularly as the latter reflects any failure to mitigate his losses. The substance of the section 69 complaint is that Mr. Portiss was discriminated against; the thrust of the remedy should therefore be to place him, as far as possible, in a position comparable to that of the general membership.

15. It is instructive that the average earnings, for 1981 for the membership of the local are estimated at \$17,408.16. That is obviously a low real estimate, given that considerably less than the 962 members enrolled actually worked as labourers for the entire year. The union conceded that the figure of 962 covered all dues paying members and would have included those members who maintained their membership even though they may have been inactive due to disability, employment in other industries, absence from Sarnia or for other reasons. In the Board's experience it would not be excessive to assume an inactive membership of as much as 10% of the dues paying members of the local. Taking that into account, it appears to the Board that a fair base of comparison is between Mr. Portiss and the active members, with allowance for Mr. Portiss' circumstances as elaborated below.

16. Based on the unchallenged figures provided by the union and allowing for unemployment, it would not be unfair to assume for the purposes of calculating compensation that the average active member of Local 1089 worked some 34.2 weeks of 40 hours during 1981. That is the number arrived at by dividing the total of hours worked in the year by an active membership of 866 labourers. That is obviously a rough figure; no doubt some worked less and others worked more, with varying rates of job premiums and amounts of overtime going to different individuals. But for the purposes of our calculation it would seem to reflect a reasonably realistic average. The wage rate, excluding benefits for the ICI sector in effect during the greater part of 1981 was \$13.38 per hour, which is comprised of hourly wages, vacation pay and statutory holiday pay. Applying that rate to 34.2 weeks of work at 40 hours per week yields an average earnings figure of \$18,303.84. That is the figure which the Board determines to be a reasonably reliable bench mark to compare the lot of Mr. Portiss to that of the average of the active members of

Local 1089 in that year. Given that the rate under the ICI agreement is the highest base wage available to labourers, selecting that rate tends to give Mr. Portiss the benefit of the doubt.

17. If the average member earned \$18,303.84 in 1981, Mr. Portiss earned \$10,928.22. The difference is \$7,375.62. The Board does not accept the union's contention that Mr. Portiss' unemployment insurance benefits should be deducted from the difference for the purposes of calculating his compensation. Firstly, there is no evidence from which the Board can determine what proportion of the \$2,547.00 Mr. Portiss received in U.I.C. benefits was attributable to periods for which he would have been at work but for the respondent's violations of the Act and what part of it would have been paid to him in any event through the normal incidence of unemployment. More importantly, to the extent that the Board's order of compensation is in the nature of damages for the violation of the complainant's right under the Act to a fair access to employment through his hiring hall, and not for remuneration not paid to him, judicial authority would not support the abatement of his claim by the amount of unemployment insurance benefits received (see, *Peck v. Levesque Plywood Ltd.* (1979), 80 CLLC 14,005 (Ont. C.A.)).

18. We are satisfied, however, that the amount of \$7,375.62 must be reduced in two ways. Firstly, there must be a reduction by virtue of Mr. Portiss voluntary quitting of his job at Combustion Engineering, a quit for which, as the Board has noted, no explanation was given in evidence. We do not, however, accept the union's submission that Mr. Portiss would necessarily have worked on that job for a further three weeks with substantial amounts of overtime at a net rate of \$800.00 per week. In our view that is an inflated figure unsubstantiated beyond the gratuitous speculation of one witness. In all of the circumstances the Board finds that Mr. Portiss failed to mitigate his losses by quitting his job at Combustion Engineering, and that his claim should therefore be reduced by the amount of \$1,000.00

19. It is also clear that Mr. Portiss was medically disabled and was therefore unavailable for work for a period of 19 days in May of 1981. The Board accepts the submission of the union that it should not be liable for any deprivation of earnings for that period. Put differently, Mr. Portiss would, assuming no violation of the Act, still have fallen 19 days short of the average total earning days for the local. The difference between his earnings and those of the average must therefore be reduced by 19 eight hour days at a wage rate of \$13.38 per hour, or a total sum of \$2,033.76.

20. The Board does not see any other basis to reduce the claim of Mr. Portiss. While he may have refused jobs in October of 1981 for the period of a few days, the evidence discloses that the practice of jockeying to avoid unfavourable referrals was not uncommon among the membership, and that a substantial number of employees did it without being penalized on the hiring hall list. While the Board does not approve that conduct, it cannot, in the circumstances, conclude that it should be held against Mr. Portiss in the computation of his compensation.

21. For the foregoing reasons the Board orders that the respondent Local 1089 pay forthwith to Mr. Portiss the sum of four thousand three hundred and forty-one dollars and eighty-six cents (\$4,341.86), with interest calculated from May 1, 1981, pursuant to the Board's Practice Note 13, as compensation pursuant to the Board's order herein dated July 11, 1983. The respondent shall also make forthwith on behalf of Mr. Portiss all payments to the welfare, dental and pension funds referred to on page 204 of the ICI collective agreement which would have been directed to those funds for his benefit, in amounts corresponding to further earnings of \$4,341.86.

4. In his submissions on behalf of the Union, Mr. Minsky contended that we should apply the same approach (the "Portiss formula") in determining the compensation payable to Mr. Marinaro in the present case. It was his position that the application of that formula to Mr. Marinaro would result in \$5,238.65, plus interest, being payable to him by the Union. With respect to Mr. D'Alessandro, his primary submission was that Mr. D'Alessandro was not entitled to any compensation as he was unable or unwilling to accept any referrals during the period in question. In the alternative, Mr. Minsky contended that Mr. D'Alessandro was only entitled to receive nominal damages.

5. Mr. Brogden advised the Board that he had been expressly instructed by Mr. Marinaro to oppose any application of the "Portiss formula" to Mr. Marinaro's case. In accordance with those instructions, he proposed two formulae for calculating Mr. Marinaro's damages. The first, which he described as an "actual losses" formula, combines the \$31,037.45 earned by Jaime Lopez by working at the Collavino job at Polysar during the period from July 15 to September 2, 1982, with the \$37,939.32 earned by Mario Savo by working at Chemstand from September 10 to November 22, 1982, and at the Rankin MHG job at Polysar from November 22, 1982 to October 23, 1983, and an "extrapolated" sum of \$24,567.40 (based on an average of \$94.49 per day for 260 days) for the period from October 23, 1983 to June 30, 1984, to yield a total of \$93,545.17, from which is deducted Mr. Marinaro's earnings of \$31,174.86 during that period, to obtain an "income loss" of \$62,370.31. The addition of interest totalling \$13,711.47 yields a "total real loss" of \$76,081.78.

6. The other formula proposed by Mr. Brogden on behalf of Mr. Marinaro combines Mr. Lopez's aforementioned earnings of \$31,037.45, the \$5,878.68 earned by Mr. Savo by working at Chemstand from September 10 to November 22, 1982, the \$39,225.90 earned by Clemente Cicchini by working at SNC Foster-Wheeler from March 25, 1983 to June 18, 1984, an additional sum of \$5,230.12 which it is contended that Mr. Cicchini would have earned on that job if he had not taken an eight-week vacation, vacation pay of \$3,556.48, and benefits of \$2,845.31, to yield a total of \$87,773.94. The deduction of Mr. Marinaro's aforementioned earnings and the addition of interest results in a claim of \$71,490.87 under that formula.

7. Mr. Brogden also proposed two formulae for calculating Mr. D'Alessandro's damages. The first, which is described as an "actual losses" formula, adds Mr. Cicchini's aforementioned earnings from March 25, 1983 to June 18, 1984, the aforementioned additional sum which it is contended that Mr. Cicchini would have earned on that job if he had not taken an eight-week vacation, Gino Iacobelli's earnings at Lumus from September 10 to November 19, 1982, vacation pay and benefit payments in respect of their earnings, and unemployment insurance benefits of \$10,000 to which it is alleged that Mr. D'Alessandro would have been entitled as a result of being employed at SNC Foster-Wheeler in place of Mr. Cicchini, and from that total deducts unemployment insurance and pension payments received by Mr. D'Alessandro to obtain a "total income loss" of \$62,901.81, to which interest in the amount of \$13,838.40 is added to obtain a "total real loss" of \$76,740.21.

8. The second formula proposed by Mr. Brogden on behalf of Mr. D'Alessandro is described as an "average earnings" formula based on the "Portiss formula". It combines Mr. Brogden's calculation of the average wages earned by members of the Union in the period from September of 1982 to June of 1984 with his calculation of the unemployment insurance benefits collected by the "average member" to obtain a "total average income" of \$42,759.24. From that sum is deducted the aforementioned unemployment insurance and pension plan payments received by Mr. D'Alessandro to obtain a "total average compensation" of \$38,151.24. The addition of interest in the amount of \$8,389.24 yields a total of \$46,540.48.

9. Having carefully considered all of the evidence before us, and all of the oral and written submissions presented by counsel on behalf of their respective clients, we have concluded that the compensation payable by the Union pursuant to the order contained in our decision of December 11, 1985 should be calculated in accordance with the "Portiss formula", as adjusted to reflect the circumstances of the present case. We share the view expressed by the Board in the *Portiss* decision that, for the reasons set forth in paragraph 13 of that decision, there is "little reliability in any formula for compensation that attempts to put the complainant in the shoes of any selected individuals or group of members." Both of the formulae proposed by Mr. Brogden on behalf of Mr. Mari-

naro involve an attempt to, in effect, place Mr. Marinaro in the shoes of selected individuals. Moreover, as noted by counsel for the respondents, Mr. Marinaro could not have followed the referrals path implicit in those formulae without being referred to work in contravention of the Union's hiring hall rules. Thus, the approach advocated by those formulae would not place Mr. Marinaro in the position that he would likely have been in but for the Union's contravention of the Act; it would place him in a position in which he could only have been if the Union had breached its section 69 duty to the other members by giving him highly preferential referrals in utter disregard of the hiring hall rules. Such approach is consonant with neither the purposes of a remedial order under section 89 of the Act nor the purposes of section 69 of the Act.

10. The "Portiss formula" does, however, require some modifications to reflect the circumstances of the instant case. The contraventions of section 69 which have been established in respect of Mr. Marinaro span a period of twenty months in three calendar years, namely, 1981, 1982, and 1983. However, the financial effect of those contraventions is far more pronounced in 1982 and 1983.

11. In 1981, the average active member of the Union worked approximately 34.2 forty-hour weeks. The ICI wage rate (excluding benefits) that was in effect during the greater part of that year was \$13.38 per hour (i.e., an hourly rate of \$12.39, plus \$.99 for vacation and statutory holiday pay). Applying that rate to 34.2 weeks of work at forty hours per week yields an average earnings figure of \$18,303.84. In 1981, Mr. Marinaro's total employment earnings were \$26,046.33. Of that total, \$12,841.31 was earned by working for Rankin at MHG (on a job to which he was referred by the Union in December of 1980, which job lasted until early July of 1981). That referral preceded any of the seven referrals in the period from July 14 to August 11, 1981 that the Board has found to involve contraventions of section 69 of the Act in respect of Mr. Marinaro. The remaining \$13,205.02 was earned by working for Besomar at Dow (on a job to which he was referred on August 17, 1981, and which lasted until January of 1982). It may be that if the Union had not contravened section 69 of the Act, Mr. Marinaro would have been offered a referral at some time during the summer of 1981. However, if he had accepted such a referral, it might well have precluded him from obtaining the aforementioned referral to Besomar. Thus, on balance and in accordance with the aforementioned considerations which have led us to adopt an averaging approach similar to that applied by the Board in the *Portiss* case, we find that Mr. Marinaro has not established any compensable loss in respect of 1981. However, we do not agree with counsel for the respondents that it would be appropriate to carry Mr. Marinaro's surplus earnings of \$7,742.49 (i.e., the difference between his earnings of \$26,046.33 and the average earnings of \$18,303.84) forward into 1982 to offset the shortfall between his earnings and the average earnings in that year. In this regard, we note that all of that difference can be attributed to earnings which occurred prior to any contravention of the Act by the Union. Moreover, as noted below, Mr. Marinaro's classifications gave him access to somewhat greater work opportunities than the "average worker" and to a somewhat higher rate in respect of some of his classification referrals. Thus, it is not unreasonable to expect that Mr. Marinaro's earnings would be somewhat higher than those of the average member. Accordingly, we are of the view that the circumstances of this case make it appropriate to apply the "Portiss formula" to Mr. Marinaro for the period from January 1, 1982, to December 31, 1983, inclusive. Since separate figures were placed before the Board concerning 1982 and 1983, we will apply the formula on an annual basis and then combine the results in order to obtain a total for that two-year period.

12. As indicated in our decision of December 11, 1985, when Mr. Marinaro registered on the out-of-work list, he generally had the classifications of foreman, cement finisher, and carpenter placed beside his name. That is relevant from a compensatory point of view in at least two respects. Firstly, it indicates that if the hiring hall had been operated in accordance with the

Union's hiring hall rules and without contraventions of section 69 of the type described in that decision, Mr. Marinaro would have had access to somewhat greater work opportunities (through classification referrals) than the "average" member of the Union, who did not have such classifications. Secondly, it indicates that Mr. Marinaro would have been entitled to receive the "foremen's rate" for any ICI work which he performed in that classification. Under Article 9 of the applicable Local Union Schedule to the 1980-82 Provincial Agreement, working and non-working foremen are required to be paid not less than fifty cents per hour more than the rate of the men they are supervising (excluding shop stewards and tool crib operators). The comparable provisions of the 1982-84 Provincial Agreement provide for a 50¢ per hour premium for working labour foremen, and a \$1.00 per hour premium for non-working labour foremen. Although it is not possible to determine precisely how many more hours of work Mr. Marinaro would have obtained during the period in question as a result of his classifications, nor precisely how many of those hours would have attracted a premium rate, the totality of the evidence before us suggests that it would not be unreasonable to conclude that, but for the Union's contraventions of section 69, Mr. Marinaro would probably have earned approximately 25% more than the average active member of the Union.

13. In 1982, the average active member of the Union worked approximately 27.16 forty-hour weeks. The ICI wage rate (excluding benefits) that was in effect during the greater part of that year was \$14.46 (i.e., a net hourly rate of \$13.37 plus \$1.09 for vacation and statutory holiday pay). Applying that rate to 27.16 weeks of work at forty hours per week yields an average earnings figure of \$15,709.34. As noted above, we are satisfied on the balance of probabilities that but for the Union's contraventions of section 69 of the Act, Mr. Marinaro would have earned approximately 25% more than the average active member of the Union. Thus, we find that his employment earnings that year would have been approximately \$19,637. His actual total employment earnings in 1982 were only \$9,574.89. Thus, he is entitled to damages in the amount of \$10,062.11 for that year. In this regard, we respectfully share the view expressed in paragraph 17 of the *Portiss* decision that unemployment insurance benefits should not be deducted from that difference for the purpose of calculating the compensation payable. In addition to the reasons contained in that paragraph for excluding unemployment insurance benefits from the calculation, as noted by Mr. Brogden, the figures which the Board uses to calculate the average active member's earnings do not include unemployment insurance benefits; thus, to compare the employment earnings of the average active member of the Union with the employment earnings plus unemployment insurance benefits received by a complainant would not be a fair comparison. However, assuming without deciding that loss of unemployment insurance benefits, if duly proven, would be an item that is not too remote to be compensable, we are of the view that no compensation can be awarded to Mr. Marinaro for loss of such benefits in the instant case as it has not been established on the balance of probabilities that but for the Union's contraventions of the Act, Mr. Marinaro would have received more than \$6,027 in unemployment insurance benefits in 1982. Indeed, if the Union had not contravened section 69 of the Act and thereby unlawfully deprived him of some employment opportunities, Mr. Marinaro might not have been eligible for some of the unemployment insurance benefits which he did receive in 1982 and in 1983.

14. In 1983, the average active member of the Union worked approximately 22.44 forty-hour weeks. The ICI wage rate (excluding benefits) that was in effect during the greater part of that year was \$16.47 (i.e., a net hourly rate of \$15.23 plus \$1.24 for vacation pay and statutory holiday pay). Applying that rate to 22.44 weeks of work at forty hours per week yields an average earnings figure of \$14,783.47. Since we are satisfied on the balance of probabilities that Mr. Marinaro would have earned approximately 25% more than that, we find that his employment earnings in 1983 would have been about \$18,479.00, but for the Union's contraventions of the Act. His actual total employment earnings in 1983 were only \$10,642.08. Thus, he is entitled to damages in

the amount of \$7,836.92 for that year. For the reasons set forth above, we are not disposed to deduct from that figure any of the unemployment insurance benefits of \$6,414.00 which Mr. Marinaro received that year. Similarly, on the assumption that loss of unemployment insurance benefits, if duly proven, would be an item that is not too remote to be compensable, no compensation can be awarded to Mr. Marinaro for loss of such benefits in the instant case as it has not been established on the balance of probabilities that but for the Union's contraventions of the Act, Mr. Marinaro would have received more than \$6,414.00 in unemployment insurance benefits in 1983.

15. Assessing the compensation which should be paid to Mr. D'Alessandro is more problematic. In paragraph 61 of our December 11, 1985 decision, we summarized our conclusions concerning Mr. D'Alessandro's complaint as follows:

In summary, we have concluded, for the reasons set forth above, that of the six referrals challenged by Mr. D'Alessandro, three involved contraventions of section 69 of the Act by the respondent trade union vis-a-vis Mr. D'Alessandro (namely, the referral of Gino Iacobelli to Lumus on September 10, 1982, the referral of Aldo Rocca to MHG-DB-Catalytic on October 18, 1982, and the referral of Clement Cicchini to SNC-Foster Wheeler on March 25, 1983). To remedy those violations, the Union will be directed to compensate Mr. D'Alessandro for the wages and benefits which he lost as a result of those contraventions of the Act. The quantification of those losses must, of course, take into account various contingencies, including the likelihood of Mr. D'Alessandro refusing one or more of those referrals, or being physically unable to perform the work in the event that he accepted one or more of the referrals.

16. Our review of the evidence pertaining to Mr. D'Alessandro's medical problems, and his resulting propensity to refuse referrals, is contained in paragraphs 23 to 26 of that decision.

23. Mr. D'Alessandro sustained a back injury while working on a job site on May 8, 1968. Since then he has undergone a variety of medical treatments with limited results. It is common ground among the parties that the respondents were aware at all material times that Mr. Alessandro had a back problem. Although Mr. D'Alessandro had been able from time to time to perform some jobs which require little exertion or movement, such as "spark watch" (i.e., watching for fire where "burners" are welding) and some work as a foreman, he has refused or left many other jobs, including foremen's jobs, because of physical problems including dizziness and pain in his back, legs, and head. The Union referred him to work as a foreman for Rankin (at MHG) on December 9, 1980. He worked there until November of 1981 when he left work because he was experiencing pain while climbing and going from place to place on the site in the performance of his normal functions as a foreman. He never returned to work for Rankin as he was laid off as a result of a shortage of work before he was physically able to return to work. Since his physician suggested that he attempt to return to work in order to experiment to see what he was capable of doing, he registered on the Union's out-of-work list on March 3, 1982 as #685, with foreman and "GF" (i.e. general foreman) as the classifications entered beside his name. He refused a referral on May 11, 1982 and was returned to the list on May 18, 1982 as #255, with tool crib, foreman and general foreman as his classifications. When his number came up on September 28, 1982, he was not at home to receive the referral since he was in Toronto concerning a family matter. Upon his return from Toronto, he registered on the list on September 30, 1982 as #629. He refused the next referral that was offered to him (on December 6, 1982), on the ground that it was general labourers' work which he was unable to perform due to his physical condition. His name was returned to the list on December 16, 1982 as #118. He refused the next job offered to him on June 22, 1983 on the same ground. On the following day he was listed as #680 with "labourer foreman" as his classification. On March 26, 1984 he was called again by the Union and again refused a job referral.

24. Mr. Alessandro was granted a ten per cent permanent partial disability award effective November 15, 1978, under what is now the *Workers' Compensation Act*, for residual disability resulting from his May 8, 1968 accident. In a decision dated February 2, 1981, the Appeal Board rejected Mr. D'Alessandro's claim that he remained totally disabled as a result of that accident.

25. Mr. D'Alessandro, who was called as a witness (on the merits) by counsel for the respon-

dents, testified that during the period covered by his complaint, his condition became worse. It was his evidence that he tried to work around the house by cutting the lawn and gardening but was unable to do so for very long because he "got dizzy, got cramps and had to leave it". Indeed, he testified that he sometimes had too much pain to even sit down. Although he testified that he would like to go to work if he could find something that was suitable, he also stated, "I don't know myself what kind of work I will be able to stand up to." After reiterating that he did not know if there was any work that he could have done during the period in question, he testified (in response to a leading question from his counsel) that he could have worked as a flagman, could have done "spark watch" work, and could have performed a foreman's job on some kinds of projects. During his re-examination by respondents' counsel, Mr. D'Alessandro conceded that he did not know if he could have been a flagman standing in one place for many hours each day. He agreed that he could not have been a working foreman, but asserted that he could have been a non-working foreman. However, he conceded that the job which he left at Rankin in November of 1981 was that of a non-working foreman, and that his condition had worsened after he left that job.

26. Dr. William Southcott, an orthopaedic surgeon to whom Mr. D'Alessandro had been referred by his family physician, was called as a witness in these proceedings by counsel for the respondents. Dr. Southcott testified that his diagnosis of Mr. D'Alessandro's condition was that he was suffering from chronic mechanical (muscular) back pain. He also told the Board that chronic pain of that type "can go on for years" and can be aggravated by "anything", including, at times, even a "simple movement". However, it was also his evidence that when he physically examined Mr. D'Alessandro in May of 1983, he found him to be a well built, muscular man whose level of fitness indicated that he must have been engaging in heavy activities in order to keep in shape. Thus, he concluded at that time that Mr. D'Alessandro was physically able to return to a job entailing heavy work. However, he also suggested (in his report to Mr. D'Alessandro's family physician) that since Mr. D'Alessandro experienced problems every time he returned to work, it might be wise to have him re-evaluated by the Workers' Compensation Board medical team at Downsview. In explaining that advice, Dr. Southcott told the Board that there would be psychiatrists and psychologists at Downsview who could deal with problems which he was not qualified to evaluate. He further testified that such re-evaluation might lead to retraining or further compensation.

17. If the hiring hall had been operated in accordance with the Union's hiring hall rules and without contraventions of section 69 of the Act, Mr. Alessandro's qualifications as a foreman or general foreman would have given him access to some work opportunities unavailable to the average member of the Union. Moreover, he would have been entitled to receive the foremen's or general foremen's rate for any ICI work which he performed in those classifications. However, that potential for increased earnings is more than counterbalanced by the substantial restrictions which his medical problems placed on his ability to accept referrals during the period in question. It is clear from Mr. D'Alessandro's own evidence that the work which he was physically able to perform during that period was severely restricted; at best, he might have been able to perform work as a flagman, do "spark watch" work, and perform a non-working foreman's job on some kinds of projects. While it is impossible to determine precisely how many hours of such work Mr. D'Alessandro would have obtained during the period in question if the Union had not contravened section 69, the totality of the evidence before us has led us to conclude that despite his qualifications as a foreman and general foreman, he would probably not have earned more than 30% of the amount earned by the average labourer, due to his medical problems and his resulting propensity to refuse referrals.

18. As indicated in paragraph 6 of our December 11, 1985 decision in this matter, we ruled on February 2, 1984 that we would not award any compensation to Mr. D'Alessandro for the period preceding September of 1982. The three referrals that were successfully impugned by Mr. D'Alessandro occurred on September 10, 1982, October 18, 1982 and March 25, 1983, respectively. As indicated above, the average active member of the Union earned approximately \$15,709.34 in 1982. Although it may be that more than two-thirds of that amount was earned dur-

ing the period from January 1 to August 31 as the summer months tend to be the busiest time in the construction industry, for the purposes of calculating damages in the present case we are prepared to assume that the earnings which make up that average accrued in roughly equal amounts during each third of the year. Thus, we find that the average active member of the Union earned approximately \$5,236.45 in the period from September 1 to December 31, 1982. During that same period Mr. D'Alessandro had no income from employment as he was unemployed. For the reasons set forth above, we do not propose to make any deduction based upon the \$3,200 in unemployment insurance benefits which Mr. D'Alessandro received during that period. Accordingly, we find that Mr. D'Alessandro is entitled to compensation in the amount of \$1,570.94 (i.e., 30% of \$5,236.45) in respect of that four-month period. (No question to entitlement to additional unemployment insurance benefits arises with respect to that four-month period as he collected unemployment insurance benefits throughout the period.)

19. As further indicated above, the average active member of the Union earned approximately \$14,783.47 in 1983. During that same period, Mr. D'Alessandro had no income from employment as he remained unemployed. Accordingly, we find that he is entitled to compensation in the amount of \$4,435.04 (i.e., 30% of \$14,783.47) for that period. With respect to the claim for loss of unemployment insurance benefits in 1982, assuming without deciding that loss of unemployment insurance benefits, if duly proven, would be an item that is not too remote to be compensable, we are of the view that no compensation can be awarded to Mr. D'Alessandro for loss of such benefits as it has not been established on the balance of probabilities that but for the Union's contravention of the Act, Mr. D'Alessandro would have received additional unemployment insurance benefits in 1983.

20. For the foregoing reasons, the Board hereby orders that the respondent union pay forthwith \$17,899.03 to Donato Marinaro, and \$6,005.98 to Luciano D'Alessandro, plus interest calculated in accordance with the Board's Practice Note No. 13 (with appropriate adjustments to reflect the fact that both of those sums would have accrued in their entirety by December 31, 1983) as compensation pursuant to the Board's order dated December 11, 1985. The Board further orders that the respondent Union make forthwith on behalf of Mr. Marinaro and Mr. D'Alessandro all payments to the welfare, dental, and pension funds (referred to in the applicable Local Union Schedule to the 1982-84 Provincial Agreement) which would have been directed to those funds, in amounts corresponding to further earnings of \$17,899.03 and \$6,005.98, respectively.

21. The decision of Board Member W. F. Rutherford will issue at a later date.

DECISION OF BOARD MEMBER W. F. RUTHERFORD; August 27, 1986

I concur with the majority decision dated July 30, 1986 in this matter insofar as it pertains to Donato Marinaro. However, I would not award any compensation to Luciano D'Alessandro, as I agree with counsel for the respondents' submission that Mr. D'Alessandro was unable or unwilling to accept any referrals during the period in question.

2944-84-U Unal Duran, Complainant, v. Ontario Hydro Employees Union, C.U.P.E. Local 1000, Respondent, v. Ontario Hydro, Intervener

Duty of Fair Representation - Settlement - Unfair Labour Practice - Terminated employee reinstated prior to arbitration through settlement - Settlement waived right of employee to grieve final termination - Whether employee estopped from raising legality or reasonableness of settlement - Board finding that settlement itself not illegal or unreasonable so as to constitute arbitrary, discriminatory or bad faith conduct on part of union

BEFORE: *Donald E. Franks*, Vice-Chairman.

APPEARANCES: *J. Bradford Nixon* and *Unal Duran* on behalf of the complainant; *Stephen T. Goudge* and *G. Holland* on behalf of the respondent; *Steven L. Moate*, *W. Collard*, *J. Kolenc* and *S. Adamson* on behalf of the intervener.

DECISION OF THE BOARD; August 8, 1986

1. The correct name of the respondent should read: "Ontario Hydro Employees Union, C.U.P.E. Local 1000".
2. This is a complaint under section 89 of the Act wherein the grievor Mr. Unal Duran alleges a violation of section 68 of the *Labour Relations Act* by the respondent trade union.
3. Mr. Duran was employed by Ontario Hydro as a draftsman in January 1981. A year later he ceased to be a temporary employee and was accorded regular employment status as a draftsman in the electrical design department at Range 58, Step 3. By the end of 1982 however, it appears that the employer in this matter, Ontario Hydro, was becoming concerned with Mr. Duran's poor work performance and lack of progress. As a consequence on January 21, 1983, Mr. Duran was eventually terminated by Ontario Hydro.
4. The respondent trade union filed a grievance with respect to that termination. The grievance went through a series of negotiated steps which culminated in the matter being referred to a board of arbitration, the tentative date for the arbitration hearing being January 27, 1984. Negotiations between the union and the employer concerning the grievance continued up to the arbitration proceeding and indeed just prior to the arbitration a settlement was arrived at between the union and the employer. That settlement exhibit #17 reads as follows:

Minutes of Settlement
re grievance W5-557
- Unal Duran

Between

Ontario Hydro - employer

- and -

CUPE local 1000 - union

1. The grievance will be withdrawn.
2. The grievor will be reinstated to a position of junior electrical draftsman grade 55, step 3 for a period of 6 months of active employment; during

which time the grievor must demonstrate his ability to perform the duties of that position.

3. If, at the end of the 6 months of active employment, the employer is of the opinion that the grievor has not demonstrated an ability to perform the duties of a grade 55, step 3 draftsman in a competent and diligent manner. The grievor may be terminated after the expiry of the 6 month period or such further time as the employer may determine up to and including 9 months.
4. The employers decision to terminate, pursuant to paragraph 8 shall not be questioned by the union or the grievor under the grievance and arbitration provisions and the grievor and the union specifically waive any such rights as they might have under the collective agreement.
5. Should the grievor be continued in employment beyond the 9 month period of active employment he shall receive a lump sum payment of 3 months salary calculated at the rate payable at that time to an intermediate draftsman grade 58, step 3.
6. If the grievor is terminated pursuant to this agreement he will receive a lump sum settlement in the form of a severance payment in the amount of 3 months salary calculated at the rate payable to at that time to an intermediate draftsman grade 58 step 3 in addition to such other severance amounts as he may be entitled to under the Collective Agreement.
7. The grievor will receive credit for seniority as if he had not been terminated and subsequently reinstated but shall receive no compensation or benefits in respect of that period.
8. The grievor, the union on their own behalf and on behalf of the grievor as bargaining agent and The Employer acknowledge by their signatories hereunder that they have read & understood this agreement.

Dated at Toronto this 27 January 84

"G. H. Holland"

AS BARGAINING AGENT FOR GRIEVOR

"G. H. Holland"
UNION

"(illegible)"
EMPLOYER

Addendum to Minutes of Settlement
re grievance W5-557 -
Unal Duran

Ontario Hydro

- and -

CUPE Local 1000

1. The grievor will be reinstated on February 6, 1984 and will be paid thereafter.
2. The grievor will be required to report for work, and the period of active employment for the purposes of the agreement executed Jan. 27, 1984 will

commence, on Feb. 13, 1984 or such earlier time as the Employer may determine.

3. The grievor, the union on their own behalf and on behalf of the grievor as bargaining agent and the employer acknowledge by their signatures hereunder that they have read and understood this agreement.

Dated at Toronto this 27 Jan. 84

"G. H. Holland"

AS BARGAINING AGENT GRIEVOR

"G. H. Holland"
UNION

(illegible)
EMPLOYER

5. It will be noted that Mr. Duran did not sign the minutes of settlement but rather that they were signed on his behalf by Mr. Holland, as bargaining agent. The evidence is that Mr. Duran was not particularly happy with the settlement but the union's evidence is that they thought that the settlement was acceptable.

6. Subsequently, Mr. Duran returned to work at Ontario Hydro. Just prior to completing months on the job, pursuant to the settlement of the grievance, the employer informed Mr. Duran that they were concerned about his performance and they wish to extend the probationary period for an additional three months as contemplated in paragraph 3 of the minutes of settlement. Subsequently, within the 9 month period referred to in that settlement Mr. Duran was terminated by Ontario Hydro for "a lack of confidence in the performance of the duties of a junior draftsman".

7. The union has refused to grieve that termination of Mr. Duran. The union takes the position that it is bound by paragraph 4 of the minutes of settlement referred to above not to subject the final termination of Mr. Duran to the arbitration procedure.

8. Counsel for the complainant argues that paragraph 4 of the minutes of settlement, quoted above, (wherein the union effectively agrees not to challenge a subsequent dismissal of Mr. Duran) is illegal and if not illegal unreasonable in the circumstances and therefore the trade union has breached its duty as bargaining agent for Mr. Duran.

9. Section 44(1) of the *Labour Relations Act* reads as follows:

(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

The argument put forward by counsel for the complainant is that all differences regarding the interpretation, application, administration or alleged violation of a collective agreement must be referred to arbitration, therefore a union cannot lawfully give up its right to arbitration pursuant to section 44(1).

10. Counsel for the intervener and counsel for the union both argue that Mr. Duran is estopped at a later point in time from raising either the legality or the reasonableness of paragraph 4 of the minutes of settlement. They both argue that Mr. Duran accepted the benefit of that settle-

ment by returning to work and that his raising the issue at this point is “a second kick at the cat” which he should be estopped from questioning.

11. In my view, there is a great deal of merit to the notion that Mr. Duran cannot raise the problem with section 4 of the minutes of settlement at this late date. By returning to work pursuant to those minutes and not challenging paragraph 4 at that time the complainant cannot raise the legality of paragraph 4 with respect to the union’s refusal to arbitrate his ultimate termination. The complainant having acquiesced in the minutes of settlement cannot at a later date challenge the settlement by which he benefited.

12. I think however, the complainant’s challenge to the legality of paragraph 4 is however quite without merit. In arguing for the illegality of “doing away with the right to arbitrate”, counsel for the complainant made the analogy with cases where a whole class of employees, such as a temporary employee is denied access to arbitration under a collective agreement. This case is substantially different from that particular problem. In the present case the refusal to arbitrate the subsequent conduct of the employer as agreed to in paragraph 4 of the minutes of settlement relates to an individual grievance itself. That is, the settlement itself was part of exercising the right under section 44(1). The effect of paragraph 4 is to waive the further exercise of the arbitration right *in the context of an arbitral proceeding*; that is both a legitimate and a reasonable matter to be discussed in an arbitration in considerations of settling arbitral proceedings and does not in and of itself demonstrate conduct which is either illegal or more specifically unreasonable conduct by the trade union such as would leave the Board to conclude that the union in waiving the right to further arbitration of the issue is acting in a manner that is arbitrarily discriminatory or in bad faith.

0335-86-R; 0919-86-FC Daniel Bowyer, Applicant, v. United Brotherhood of Carpenters and Joiners of America, Local 2679, Respondent, v. **Egan Visual Inc.**, Intervener; United Brotherhood of Carpenters and Joiners of America, Local 2679, Applicant, v. Egan Visual Inc., Respondent

First Contract Arbitration - Termination - Termination application filed prior to s. 40a becoming law - Whether s. 40a to be interpreted so as to deprive employees of pre-existing legal rights - Whether union’s failure to file reply fatal to challenge of termination application - Board hearing all evidence relating to both termination and first contract applications before deciding which to grant

BEFORE: *Ian Springate*, Alternate Chairman, and Board Members *F. Burnet* and *R. Montague*.

APPEARANCES: *C. J. Abbass*, *Daniel Murray Bowyer* and *Maxine Bowyer* for *Daniel Bowyer*; *M. A. Church*, *Walter Oliveira* and *Sergio Liliani* for *Carpenters Local 2679*; *Howard Leviitt*, *James Egan* and *Doug McLean* for *Egan Visual Inc.*

DECISION OF THE BOARD; July 17, 1986

1. On February 18, 1985 the Board certified United Brotherhood of Carpenters and Joiners of America, Local 2679 (the “union”) as the bargaining agent for a unit of employees of Egan

Visual Inc. (the "company"). As of yet, the union and the company have not entered into a collective agreement.

2. Daniel Bowyer is an employee of the company who is employed in the bargaining unit represented by the union. On April 4, 1986 Mr. Bowyer filed an application under section 57 of the *Labour Relations Act* for a declaration terminating the union's bargaining rights. Accompanying the application were two documents signed by a number of employees indicating they no longer wish to be represented by the union. No challenge is made to the timeliness of the application under section 57(1) of the Act which is set out below:

57.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

3. The termination application was listed for hearing on Monday, July 7, 1986. On that date, counsel for the union submitted that the Board should not consider the application in that on the previous Thursday, July 3rd, the union has applied to the Board to direct the settlement of a first collective agreement by arbitration. The application was made pursuant to the provisions of section 40a of the Act, which became part of the Act on May 26, 1986 when Royal Assent was given to the *Labour Relations Amendment Act, 1986*. Those portions of section 40a relevant to this stage of the proceedings are set out below:

(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

...

(21) This section applies to an employer and a trade union where the trade union has acquired or acquires bargaining rights for employees of the employer before or after the coming into force of this section and the bargaining rights have been acquired since the 1st day of January, 1984 and continue to exist at the time of an application under subsection (1).

(22) Notwithstanding subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

- (a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and

- (b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

(23) An application for a declaration that a trade union no longer represents the employees in the bargaining unit filed with the Board after the Board has given a direction under subsection (2) is of no effect unless it is brought after the first collective agreement is settled and unless it is brought in accordance with subsection 57(2).

4. At the hearing counsel for Mr. Bowyer took the position that because the union had failed to file a reply to the termination application, the Board should not allow the union to raise any matter related to the application, including the fact that it had filed an application for arbitration of a first collective agreement. In support of this position, counsel relied on the Board's Rules of Procedure, particularly Rule 17, as well as the claim that without such a reply, he had no way to prepare for the issues which the union might raise. Section 40a(22), however, stipulates that when an application for arbitration of a first collective agreement and a termination application are both before the Board, the Board is to determine them in the order it considers appropriate. In our view, the union's action in filing the application for arbitration of a first agreement was sufficient to trigger a requirement that the Board put its mind to both applications, and consider them in the order it considers appropriate. This being the case, at the hearing we ruled orally that the union's failure to file a reply to the termination application did not preclude it from relying on its application for arbitration of a first collective agreement.

5. As noted above, the termination application was filed on April 4, 1986, whereas section 40a did not become law until May 26, 1986. At the hearing, counsel for both Mr. Bowyer and the company contended that section 40a should not be interpreted in such a way as to deprive Mr. Bowyer and other employees of their pre-existing legal right to terminate the union's bargaining rights. In support of this position, counsel relied on a number of legal authorities which indicate that a statute is generally to be interpreted so as to not operate retrospectively. Among the authorities relied on was the third edition of the *Canadian Encyclopedic Digest* which summarizes the law as follows:

242 It is a fundamental rule that statutes are presumed to be intended to apply to future acts and conditions and, therefore, a statute, other than one dealing with procedure, will not be held to operate retrospectively unless clear intention that it should do so is manifested by express words or arises by necessary and distinct implication, and particularly so where a retrospective interpretation would lead to an interference with existing rights. The intention to make a statute retrospective must appear from the words of the statute itself, and where the result of giving a retroactive interpretation leads to unreasonableness, the statute will not be given a retroactive effect. This is particularly so where a retrospective interpretation would act to impose new duties or attach new disabilities in respect of a past transaction.

...

243 That the Legislature has demonstrated an intention to enact retrospectively to a certain extent is not sufficient to warrant a retroactive operation carried beyond the meaning of the terms used when strictly construed. The presumption against retroactive operation is to be applied so as to confine language to some extent expressly retroactive to the case indicated. The Court ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than it can plainly see the Legislature meant.

6. We accept the general proposition that a statute is not to be interpreted so as to interfere with pre-existing rights unless the intention that it do so is clearly indicated. There is no ques-

tion but that the termination application is properly before us. Accordingly, the issue is whether the Legislature intended that an application for arbitration of a first collective agreement could be filed notwithstanding that a termination application had been filed prior to the enactment of Section 40a. The Legislature directly addressed the issue of when section 40a applies. Subsection 21 expressly provides that section 40a relates to bargaining relationships that were acquired after January 1, 1984 and continue to exist at the time of an application under the section. In the instant case, the union obtained its bargaining rights subsequent to January 1, 1984 and such rights continued to exist when it filed its application. Since the application fits squarely within the time frame provided for by the Legislature, we are satisfied that it is in fact a timely application, notwithstanding that it impacts on the previously filed termination application.

7. In a case such as this, where there exists an application under section 40a and a termination application, the Board is to consider the applications in the order it considers appropriate. The union and Mr. Bowyer both seek to have their application considered first. Mr. Bowyer relies, in part, on the fact that the union did not earlier commence proceedings before the Board complaining of the company's conduct. In our view, while this may be a relevant consideration it is not necessarily determinative. For its part, the union relies on the allegations contained in its application for a first agreement, and contends that at this stage of the proceedings the Board should accept its allegations as true, notwithstanding that the company disputes their accuracy. As indicated at the hearing, we see no basis for accepting the union's allegations as true. To the extent they are disputed by the company, the union's allegations can only be established by proper evidence.

8. The termination application and the application for arbitration of a first agreement are closely related. If a majority of employees no longer support the union, as is alleged by Mr. Bowyer, a question arises as to the wisdom or usefulness of directing the arbitration of a first agreement. On the other hand, if the erosion of employee support for the union is due to the company's action in taking an unreasonable position in collective bargaining, as alleged by the union, then perhaps an arbitrated agreement is required to remedy the situation. Given these considerations, we are of the view that the Board should hear all of the evidence relating to both applications before deciding which, if any, of the applications it will grant. We feel the proper procedure is to have Mr. Bowyer lead his evidence first, followed by the union and the company, with the parties having an appropriate right of reply. We note that this procedure has been adopted in response to the particular circumstances of this case, and may not necessarily be followed in subsequent proceedings involving other applications.

9. In that this panel has not heard any evidence, it is not seized with the applications.

10. The matter is referred to the Registrar.

0335-86-R; 0919-86-FC Daniel Bowyer, Applicant, v. United Brotherhood of Carpenters and Joiners of America, Local 2679, Respondent, v. **Egan Visual Inc.**, Intervener; United Brotherhood of Carpenters and Joiners of America, Local 2679, Applicant, v. Egan Visual Inc., Respondent

Charter of Rights and Freedoms - First Contract Arbitration - Representation Vote - Termination - Application for declaration terminating bargaining rights and direction of settlement of first collective agreement by arbitration - Whether section 40a restricts freedom to contract - Whether section 7 of the Charter contravened - Whether time limits for termination applications restrict freedom of association - Parties agreeing to representation vote

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

DECISION OF THE BOARD; August 6, 1986

1. File No. 0335-86-R is an application for a declaration terminating bargaining rights. File No. 0919-86-FC is an application to have the Board direct the settlement of a first collective agreement by arbitration. Certain matters relevant to both applications were dealt with by the Board in a decision dated July 17, 1986.

2. When this matter came on for hearing on July 29, 1986, the company contended that section 40a of the *Labour Relations Act*, which allows the Board to direct the settlement of a first collective agreement by arbitration, was ultra vires the Legislature in that it conflicts with the *Canadian Charter of Rights and Freedoms*. The company contended that since section 40a restricts its freedom to contract, it conflicts with the company's right to "liberty" guaranteed by section 7 of the Charter. The company also claimed that since section 40a places restrictions on when employees can apply to terminate a union's bargaining rights, it and all similar time restrictions contained in the *Labour Relations Act* conflict with the employees' freedom of association guaranteed by section 2(d) of the Charter.

3. On July 30, 1986 the Board in an oral ruling rejected the company's position. We are not satisfied that section 7 of the Charter, which provides that "Everyone has the right to life, liberty and security of the person" goes so far as to encompass freedom of contract on the part of a corporation. Further, in our view, the freedom of association protected by section 2(d) of the Charter does not mean that all restrictions on when employees can apply to terminate a union's bargaining rights, or have another union apply to become their bargaining agent, are invalid. Such restrictions are required to provide stability in labour relations and to allow the system of labour relations contemplated by the *Labour Relations Act* to function in an orderly manner. In that such restrictions form an essential part of an overall statutory scheme which serves to enhance and protect employees' freedom of association, they do not result in any real loss in the freedom to associate on the part of employees. In the alternative, if the time limits do in fact impinge on employees' freedom of association, then as part of a statutory scheme designed to bring order and stability to labour-management relations we are satisfied they are justified under section 1 of the Charter as limits prescribed by law that can be demonstrably justified in a free and democratic society. Further, we see no particular difficulty with the provision in section 40a that when the Board directs the settlement of a first collective agreement by arbitration the Board cannot consider any application for a declaration terminating bargaining rights until the last two months of the collective agreement. Other provisions of the Act provide for the same time limit in situations where a first agreement is freely negotiated within a reasonable time frame. We see no logical reason why the

same limit should not apply where a first collective agreement is to be determined by arbitration in situations where, as required by section 40a, the Board is satisfied that the collective bargaining process has failed to achieve a collective agreement due to unreasonable conduct on the part of one of the parties.

• • •

[Balance of decision setting out parties' agreement to representation vote omitted: Editor]

1683-85-R The International Union of Bricklayers and Allied Craftsmen & Local Union 7 Canada, Applicant, v. **Ellis-Don Limited**, Respondent

Certification - Construction Industry - Employer - Subcontractor on project going bankrupt - General contractor paying subcontractor's employees in order to complete project - Subcontractor continuing to control project - General contractor becoming employer for purposes of certification application

BEFORE: *D. E. Franks*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *Mike W. Pruschowsky* and *Danny DeMonte* for the applicant; *Mark Contini* and *Leonard Finegold* for the respondent.

DECISION OF THE BOARD; August 29, 1986

1. The name of the respondent is amended to read: "Ellis-Don Limited".
2. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.
3. The respondent employer is bound by the provincial agreement between the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario relating to bricklayers. The present application relates to marble masons, tilayers and terrazzo workers and their apprentices.
4. The respondent was the general contractor on the project at which the employees who were the subject of this application were employed. As general contractor the respondent subcontracted certain tile work to Durie Mosaic and Marble (1978) Limited (hereinafter referred to as "Durie Mosaic and Marble"). During the period from September 13th to October 7th, 1985 Durie Mosaic and Marble was in the process of going bankrupt. Subsequently, on October 7th, 1985 the job was subcontracted to TMT Limited who came onto the site and performed the job. The present application was made on October 4th, 1985 and in it the applicant takes the position that on that date the respondent Ellis-Don Limited (hereinafter referred to as "Ellis-Don") had become the employer of the tile setters in question and thus the proper employer for the purposes of this application for certification.
5. It is agreed that during the period from September 13th to October 7th before TMT Limited took over the job, a series of interim arrangements were made at the job. As a consequence, the previous employees of Durie Mosaic and Marble were put on the payroll of Ellis-Don; contributions were made by Ellis-Don to the various funds under the collective agreement which

Durie had been bound and the cheques that were issued were Ellis-Don cheques. Indeed, Mel Durie, the owner of Durie Mosaic and Marble continued to control the project, acting on the one hand as a representative of the trustee in bankruptcy, however, also retained as a consultant by Ellis-Don. From Ellis-Don's point of view, therefore, things continued as before with Mr. Durie looking after the job in the interim. That is, Ellis-Don did not specifically direct or control Mel Durie. On the other hand, Ellis-Don admits that they paid Durie but as a consultant not an employee.

6. Counsel for Ellis-Don therefore argues that Ellis-Don was not the employer of the tradesmen in question during this interim period. That the arrangements were essentially the same as before and, consequently, Ellis-Don did not assume the relationship of employer vis-a-vis the tradesmen in question.

7. Unfortunately we cannot accept the representations of counsel for the respondent in this matter. Clearly, in the interim period the relationship between Ellis-Don and the tradesmen on the site did change although we have no doubt that the respondent Ellis-Don acted with the best of intentions to protect the tradesmen in the face of the bankruptcy proceedings. In so doing, however, Ellis-Don became the employer of those tradesmen. Not only did the respondent Ellis-Don pay the employees and make the relevant contributions to the various funds pursuant to the collective agreement that Durie had in retaining Mel Durie, even as a consultant, Ellis-Don assumed ultimate control of the work being performed by the tradesmen. We have no doubt therefore that the respondent Ellis-Don became the employer of the persons in question for the period between September 13th and October 7th. Thus, on October 4th, the date of the making of this application Ellis-Don was clearly the employer.

...

[Balance of decision omitted. Certificate issued to union: Editor]

0470-85-M United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant, v. Attica Investments Incorp. carrying on business as **Fairbank Carpentry** and E & R Carpentry Inc., Respondent

Construction Industry Grievance - Practice and Procedure - Applicant union closing case in chief without calling evidence - Respondent making motion for nonsuit for failure to prove unemployed members available to perform improperly subcontracted work - Motion denied - Missing element only relevant to remedy and remedy yet to be considered by Board

BEFORE: *Robert J. Herman*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *David A. McKee* and *F. Rimes* on behalf of the applicant; *W. Thornton* and *L. Breda* on behalf of the respondent.

DECISION OF THE BOARD; August 29, 1986

1. This is the referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.

2. The grievance is hereby amended to refer to the applicant as Local 27 of the United

Brotherhood of Carpenters and Joiners of America, rather than Local 1190. Although E & R Carpentry Inc. is listed as a respondent to these proceedings, the applicant agrees that that respondent played no part in the circumstances giving rise to this grievance, and that no remedy is being sought with respect to that respondent.

3. The grievance is set out in a letter dated May 22, 1985 and reads as follows:

May 22, 1985

Attica Investments Incorporated carrying
on business as Fairbank Carpentry and
E & R Carpentry Inc.
3 Princess Andrea Court,
Brampton, Ontario
L6T 3J7

Attn: Mr. Livio Breda

Dear Sir:

We act as solicitors for United Brotherhood of Carpenters and Joiners of America, Local 1190 ('the union'). On behalf of the union, we hereby file a grievance against Attica Investments Incorp. and E & R Carpentry Incorporated pursuant [sic] to the grievance and arbitration [sic] provisions of the Collective Agreement binding on the union and the two corporate employers.

The union alleges that the employers have employed persons who are not members of the union and have not acquired said persons to become and remain members of the union as a condition of employment. Further, the union alleges that the employer has not remitted the required union dues and benefits on behalf of its employees as required by the Collective Agreement. Further, the employer has not paid the wage rates set out in the Collective Agreement for work performed by its employees.

The union alleges that the employer has violated the Collective Agreement from November 1, 1984 to the present date.

The union alleges that the employers have violated Articles 3,6,8,9 and 11 of the Collective Agreement and claim damages therefor.

The union claims as damages the initiation fees and dues which ought to have been remitted on behalf of Carpenters and Carpenters' apprentices employed by the employer, and the payment of all benefits which the employer should have paid pursuant to the Collective Agreement. Further, the union seeks payment of the appropriate wage rates to all persons employed by the employer for the period noted above.

It is our intention to refer this grievance to arbitration forthwith.

Yours truly,

4. The parties agree that the applicable provision of the collective agreement reads as follows:

ARTICLE 3 - UNION SECURITY

3.01 The employer shall only employ members of the Union who are in good standing, as long as the Union can supply qualified employees in sufficient numbers who are capable of performing the work required.

3.02 An employer shall not sub-contract work covered by this Agree-

ment except to an employer who is bound by the provisions of this Agreement.

- 3.03 No member of the Union shall be permitted to undertake or contract any work covered by this Agreement unless, he becomes signatory to this Agreement.
- 3.04 No person who is a member of management shall do any work which would normally be performed by employees covered herein.
- 3.05 It shall be within the discretion of the Employer to hire the number of workers needed in a particular classification to perform the work required under the provisions of this Agreement.
- 3.06 As a condition of continued employment, all employees shall maintain their membership in the Union.
- 3.07 Any employee who fails to become a member of the Union, or fails to maintain his membership therein shall forfeit his right of employment.
- 3.08 The employee shall have unrestricted mobility throughout the geographic area.

5. The proceedings commenced with union counsel advising the Board of the facts agreed to between the parties. It is necessary to set them out in some detail, as the issue before us involves those facts. The relevant time periods were from November 1, 1984, as alleged in the grievance, until June 14, 1985. A No Board Report issued on May 28, 1985, and allowing for the statutory two days for service, fourteen days after service of the No Board Report falls on June 14, 1985. It was further agreed that the respondent Attica Investments had subcontracted certain work to subcontractors not in contractual relations with Local 1190 (as it then was). The Board was advised that company counsel had a list of amounts paid to those subcontractors, by way of cheques, and that the work covered by these amounts was all in geographic areas as specified by the particulars provided by the applicant in a letter dated June 21, 1985. Applicant counsel noted that the respondent intended to raise an issue that for the assessment of damages, the ninety day limitation period in the collective agreement precluded recovery prior to February 20, 1985. Without conceding this point, the applicant agreed that the amount from February 20, 1985 (the date ninety days prior to the filing of the grievance) until June 12, 1985 was \$88,872.00. The applicant further agreed that the amount of money in question for the period from November 1, 1984 to February 19, 1985 was \$75,911.00. The applicant noted that these were the amounts in question with respect to the subcontracted work, which would "otherwise be damages".

6. Counsel for the respondent agreed for the most part with this recital of facts, noting one minor discrepancy with respect to the particulars provided, which discrepancy is not an issue in these proceedings. Counsel did indicate that their producing the records with respect to the amounts in question was without prejudice to their right to argue that Article 17.05 of the collective agreement restricted damages to a ninety day period. Counsel did admit that the subcontracting referred to by counsel for the applicant was done on those projects as set out in the letter of June 21, 1985 providing particulars.

7. Based on these agreed facts, applicant counsel opened his case. Counsel noted that the respondent did have defences to raise, notwithstanding the agreed facts, and that counsel for the respondent had advised applicant counsel verbally of what those defences were. Nevertheless, given the *prima facie* case in favour of the applicant, the applicant had no evidence to lead, subject

to its right to call reply evidence. Thereupon, the applicant closed its case in chief, without having called any evidence.

8. Counsel for the respondent, upon being invited to commence leading his evidence, made a motion for a nonsuit. Counsel further elected to not call any evidence, and asked that the Board therefore rule forthwith on his motion for nonsuit. Based on *Piggott Construction Limited*, [1985] OLRB Rep. Aug. 1290, counsel submitted that even if there was a finding of liability against the employer, the union was required to prove that it was in a position to provide men or union members who were unemployed at the relevant time and were available to perform the work which was improperly subcontracted. Counsel submitted that there was no such evidence before the Board. Counsel also referred to *George Ryder Construction*, [1981] OLRB Rep. Dec. 1785, which stood for the proposition that there was a positive obligation on the union to demonstrate that there were unemployed members available at the relevant time. Failing such demonstration, then notwithstanding a breach of the subcontract clause of the collective agreement, the Board could award no damages, but issue only declaratory relief.

9. Counsel for the respondent conceded that there was a *prima facie* violation of the collective agreement (although the Board notes that counsel specifically declined to concede this prior to counsel for the union closing his case). Had the grievance proceeded counsel indicated he would have led evidence with respect to the damages issue, and would have raised various defences thereto. Counsel was content that the union was entitled to a declaration that the employer had violated Article 3.02, as there was a *prima facie* violation of that Article based upon the agreed facts and there was no evidence to rebut that *prima facie* violation.

10. Counsel further indicated that when an election to call no evidence is made, it is made with respect to all the evidence in the proceeding, and not only evidence with respect to the issue of liability. There was no suggestion in the proceedings before the panel that either party was requesting that damages be deferred until a finding of liability, and that the Board remained seized with that matter. As both counsel had closed their cases, subject only to final submissions, and as no request that the Board defer consideration of damages had been made, in counsel's submission the union must be successfully nonsuited as it had failed to prove, or to provide any evidence whatsoever, with respect to a critical factor.

11. In reply, counsel for the applicant objected on several bases. First, in counsel's submission the respondent had never indicated its formal position with respect to this issue on the record, and during settlement discussions between the parties prior to the proceeding before the Board, no mention of this possible defence had been raised. Second, when the agreed facts were related to the Board by applicant counsel, the Board was advised of the totals of various cheques issued to subcontractors and that the parties had agreed that those amounts would "otherwise constitute damages". In counsel's submission the *George Ryder* case dealt with the question of mitigation of damages, and reference was made to two wrongful dismissal cases. That case stood for the proposition that the onus in a wrongful dismissal case dealing with failure to mitigate lies upon the defendant. Any allegation that the union was not able to supply employees is in the nature of a "positive defence", and at the very least the respondent must be required to raise this defence, if not earlier, at least by the point when the agreed facts were put before the Board. It was not open to counsel for the respondent to agree to facts that included a statement that certain amounts of money would "otherwise be damages", say nothing by way of defence or exception, and then seek to rely on a positive defence which must be raised by the respondent. Counsel referred to *Sun Parlor Greenhouse*, [1971] OLRB Rep. Nov. 743, for support for the proposition that, unlike the court system where discovery is available, the parties have no procedures to discover in advance the case that they have to meet and therefore the Board ought to deal with these issues as they arise.

Although conceding that the union would ordinarily have the onus of proving damages in an arbitration, counsel distinguished the general onus from the instant proceeding, where the parties had agreed that a certain amount of money would “otherwise be damages”, and where the respondent, in that context, had chosen not to define or object to the word “otherwise”. Counsel did not suggest that the *Piggott Construction* factor was not necessary in order to award damages.

12. In reply, counsel for the respondent indicated that he had no idea what “otherwise be damages” might have meant, nor did he even remember it having been said. He strongly objected to any suggestion that the respondent had agreed to what was a fundamental part of the union case, the availability of members to perform the subcontracted work. He also disagreed that there was any positive obligation on the respondent to raise this issue, and noted that the *Piggott Construction* case suggested the precise opposite. The only article concerning liability was Article 3.02 of the collective agreement, and the cases demonstrate that any damages awarded for violation of a subcontract clause are contingent upon there being qualified members available. With respect to any positive obligation on his part, counsel simply indicated that if opposite counsel neglects a fundamental area, part of their case, such neglect in no way creates a positive obligation on the other counsel to raise that issue. Counsel drew an analogy to a theft prosecution in the criminal courts, where the Crown forgets to prove who owned the property in question. The Crown cannot thereafter look to defence counsel, and the fact that there is no discovery process in criminal proceedings, to justify the court placing on defence counsel the obligation to prove the ownership of the property in question.

13. Paragraph 8 of the *Piggott Construction* case (*supra*), reads in part as follows:

“ The union’s referral includes a request for damages. The Board asked, in the course of the proceedings, whether the parties wished the Board to remain seized respecting the amount of damages should the Board find liability in the employer. Both parties requested the Board to receive evidence on the amount of damages which would be owing....”

As can be seen, in that case the parties specifically and explicitly turned their minds to the question of damages and asked that the Board deal with that issue as part of the main body of the case, and accordingly led evidence relevant to the remedy issue. In the instant proceeding, distinguishing it from *Piggott Construction*, nothing was said by either party with respect to the Board dealing at this stage with remedy, nor did the Board inquire of the parties their wishes in that respect. Respondent counsel implicitly suggests that it was clear that damages were to be dealt with as the agreed facts included recital of the amounts in question under the subcontracted work. Applicant counsel in turn responds that when the amounts were recited to the Board they were given along with the indication that they would “otherwise be damages”. In short, the Board is being asked by counsel for the respondent to conclude that the question of damages was clearly to be dealt with by the Board at this stage, based upon the agreed statement of facts and on both parties declining to call any other evidence, notwithstanding that there was no specific request that the Board deal with damages. It is clear that counsel for the union believed one of the following: that the amounts agreed to were agreed to “as damages” and not merely as amounts of the subcontract, or alternatively, that the issue of remedy or damages remained to be canvassed at a later date. In the Board’s view, each counsel had a different impression of what was being agreed to and placed before the Board for its decision, and of the legal effect of the facts agreed to, but neither counsel indicated such to the Board.

14. Further, in the Board’s experience (and no doubt counsels’ as well) it is not at all uncommon for the Board in a section 124 arbitration to deal initially only with the matter of liability, and to hear no evidence nor any submissions with respect to remedy. The motion for nonsuit deals with the remedy, and not the issue of liability, and is premature as the question of the appro-

priate remedy was not being dealt with by the Board. Had either party clearly indicated that the evidence was relevant to the issue of damages, and that the Board was to deal with that matter as well, we would view matters differently. To conclude otherwise in the circumstances before us, would be to analyze to an exceedingly fine degree the precise words used by each counsel in their submissions, and to draw a conclusion thereby that would involve declining to deal with the real merits of this dispute. Where neither counsel explicitly or inferentially advised the Board of the intention that the Board at this stage deal with damages, we cannot believe that sound labour relations would be promoted by such an analysis.

15. In *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449, in the context of a proceeding pursuant to section 89 of the Act, alleging an unfair labour practice, the Board stated, at paragraph 31:

31. During his reply argument, counsel for the respondent submitted that if the Board found a violation of the Act in respect of the layoffs, it should award compensation only to Mr. Price and not to any of the other grievors, since Mr. Price was the only grievor who testified in these proceedings and was "exposed to cross-examination on the merits". Counsel based this request upon certain arbitral jurisprudence which indicates that if the parties wish a grievance arbitrator to deal only with the question of liability and retain jurisdiction to hold a further hearing for the purpose of quantifying damages, counsel must specifically make such request during the hearing on the merits, and obtain the other party's agreement to such procedure. However, that approach has not met with universal acceptance by arbitrators. Moreover, whatever the situation may be in the context of arbitration proceedings, this Board, as master of its own procedure with express statutory authority under section 102(13) of the Act to "determine its own practice and procedure", has an established practice of affording the parties an opportunity to agree upon the amount to be paid in cases in which the Board awards compensation. That longstanding practice, which is well known and accepted by members of the labour relations community, reduces the length and cost of Board proceedings. If a complaint is dismissed by the Board, no question of quantum arises. Thus, any evidence adduced concerning that issue would come to naught. Moreover, it has been the Board's experience that the parties are able to reach agreement on quantum of compensation in the vast majority of cases in which compensation is ordered to be paid. Thus, the Board's practice in this regard minimizes the cost and length of Board proceedings to the benefit of the parties who appear before the Board and the taxpayers who finance the operation of the Board. This highly desirable practice does not depend upon the consent of the parties or a request by counsel. It is a practice which the Board has adopted on its own motion in the interest of efficient and effective performance of its duties and responsibilities under the Act, as an ordinary incident of the Board's power under section 102(13) to control its own processes. Moreover, no express retention of jurisdiction is necessary in such cases, since section 106(1) expressly empowers the Board to at any time reconsider any decision, order, direction, declaration, or ruling made by it, and vary or revoke any such decision, order, direction, declaration, or ruling. This practice results in no prejudice whatever to a party, such as the present respondent, which has breached the Act, for if it is of the view that the minimum amount of compensation which the complainant or grievor is prepared to accept is not justified, it may insist upon the complainant or grievor returning to the Board for quantification of the award. In this regard, we further note that there is no obligation on a complainant or grievor to testify during the hearing of the merits of a section 89 complaint to which section 89(5) applies. Indeed, the Board is called upon from time to time to deal with cases of mass layoffs in which the calling of each individual grievor would result in unduly protracted proceedings and much unnecessary duplication of evidence. Similarly, in the present case, it was unnecessary for Union counsel to call Messrs. Durham, Nirwan, and Storr since evidence concerning pertinent facts such as their Union activities had already been placed before the Board through the testimony of other witnesses and the membership cards filed with the Board by the Union. We would further note that respondent's counsel gave no indication, prior to raising this matter in his reply argument, that he wished the Board to depart from its normal practice of severing the issue of quantum from the merits of the complaint. Indeed, his failure to ask Mr. Price any questions pertaining to quantum in his cross-examination of that witness could only serve to implicitly convey to Union counsel that he was satisfied to have that issue dealt with at a later stage in the proceedings (if necessary). Under the circumstances, it would be unfair and inappropriate for

the Board to depart from its usual, well-established practice on the basis of a request raised by respondent's counsel for the first time during his reply argument.

While the context before us is different, that analysis appears in large part applicable. (And see *Arlington Crane Service Limited*, [1985] OLRB Rep. Nov. 1547.)

16. Accordingly, the motion for nonsuit is denied, on the basis that the necessary element missing from the union's case is an element relevant only to the issue of remedy, and that issue has not yet been considered by the Board. At the appropriate time, should there be a finding of liability and should the parties remain unable to resolve the issue of remedy themselves, or alternatively should the parties request that the Board deal with that issue, evidence can then be led and submissions made with respect to that issue. This matter is to be re-listed to entertain the parties' final submissions with respect to the issue of liability, and with respect to any other matter relevant to the proceedings.

3221-85-R Michael C. Szabo, Jurgen L. Hasse, Dale A. Lambert, Kim J. Sheffield, Applicants, v. Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen, Local 23, Respondents, v. **Fred Jantz Masonry Construction Company Limited**, Intervener

Bargaining Unit - Construction Industry - Termination - No collective agreement covering non-ICI projects and no work performed by employees in ICI sector - Whether applicants can seek termination of bargaining rights for both the ICI and non-ICI sectors - Whether employees working in only one unit can terminate bargaining rights in other one - Effect of statutory scheme imposing province-wide bargaining in ICI sector

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members R. J. Gallivan and W. F. Rutherford.

APPEARANCES: Kim J. Sheffield, Jurgen Hasse, Dale A. Lambert and Michael C. Szabo for the applicants; Mark Zigler, John Zanussi and Richard Foreman for the respondents; H. Dinsdale, W. Thornton and F. Jantz for the intervener.

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; August 25, 1986

I

1. The name of the respondent is hereby amended to read: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen, Local 23. The Board further hereby adds Fred Jantz Masonry Construction Company Limited as a party intervener. For ease of reference, the respondents will be referred to simply as "the union" and the intervener will be referred to as "the company" or "Jantz". The International Union of Bricklayers and Allied Craftsmen, of which the respondents are a component part, will be referred to as "the International". The Masonry Industry Employers Council of Ontario, mentioned below, will be referred to as MIECO.

2. This is an application for termination of bargaining rights made pursuant to section 57(2) of the *Labour Relations Act*. That section reads as follows:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

[emphasis added]

The basic facts are not in dispute.

II

3. Fred Jantz owns a small construction company. The applicants have worked for him for a number of years. At one time, Mr. Jantz did work in all sectors of the construction industry, including the industrial, commercial and institutional sectors of the industry (hereinafter referred to simply as the "ICI sector"). In recent years, however, the company has not performed any ICI work. It has been engaged only in residential construction.

4. It is not disputed that there is currently no collective agreement in effect covering non-ICI construction activities, nor has the union made any recent attempt to bargain for, or represent, Jantz's employees working on residential projects. Indeed, the applicant employees told the Board that they have had no active involvement with the trade union for some years and ceased paying union dues in late 1983 or early 1984. Although they had been union members for a long time, they saw no point in continuing to support an organization which was not taking any obvious steps to represent them. For its part, the union concedes that it has not pressed such bargaining rights as it may have in the residential sector - the only relevant sector in recent years.

5. The employer's collective bargaining history and its relationship to the respondents has already been examined in detail in an earlier Board case (see *Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 23 v. Fred Jantz Masonry Construction Company Limited*, [1981] OLRB Rep. Sept. 1229). That history is also relevant to the disposition of the present case, and the parties did not quarrel with these "collective bargaining facts" established in the earlier decision. The dispute centres on their legal significance, and, in particular, the effect of the introduction in 1978 of an elaborate statutory scheme imposing, and regulating, province-wide bargaining in the ICI sector

of the construction industry.

III

6. In 1973, the company and the Provincial Conference signed a collective agreement of a type commonly referred to in the construction industry as a "short form agreement". This agreement did two things. First, the agreement established the union's bargaining rights in each of the geographic areas administered by the local unions which make up the Provincial Conference. As a practical matter, this established the union's bargaining rights on a province-wide basis. Second, the short form agreement bound the company to the collective agreement then in effect between the Provincial Conference and MIECO which was effective from May 1, 1973 until April 30, 1976. Neither the bargaining rights nor the terms of the collective agreement are restricted to a particular sector of the construction industry. The union acquired bargaining rights for all bricklayers (etc.) employed by the company in any sector in which they might work, in any geographic area of the province. The collective agreement with MIECO established the terms and conditions upon which all such employees of the company would be employed. In effect, the short form agreement established a comprehensive, province-wide, multi-sector collective bargaining arrangement. The 1973-76 collective agreement was subsequently replaced by a similar arrangement in effect from May 24, 1976 to April 30, 1978. (For further details see the first *Fred Jantz* decision at paragraphs 5 and 6.)

7. In 1978, the Legislature substantially amended the construction industry provisions of the *Labour Relations Act* to introduce compulsory, province-wide bargaining, by trade, in the "ICI sector" of the industry. Thereafter, bargaining had to be conducted through provincially designated employer and employee bargaining agencies (essentially designated employer associations and provincial councils of local unions). For masonry employers the designated employer bargaining agency was MIECO. For unionized masonry employees, the designated employee bargaining agency was the Provincial Conference representing the various geographically defined local unions, and its parent International.

8. After the 1978 amendments, ICI bargaining had to be conducted in accordance with the special rules, and through the designated institutions established by the *Labour Relations Act*. However, those provisions did not address how bargaining should be conducted *outside* the ICI sector, or the potential effect of the new amendments on *pre-existing multi-sector* provincial bargaining arrangements. MIECO and the designated employee bargaining agency were entitled to negotiate a provincial ICI agreement binding, by operation of law, on companies such as Jantz. But what about Jantz's business activities in other sectors? Was Jantz required to mechanically apply the provincial ICI agreement to its activities in other sectors? Did the fact that MIECO now had a *statutory* right to bargain on behalf of unionized contractors working in the ICI sector and had a history of bargaining on a multi-sector basis, preclude a company like Jantz from asserting an independent bargaining posture for non-ICI work? That was the issue addressed in the first *Fred Jantz* case.

9. In *Fred Jantz No. 1, supra*, the union complained that the company had failed to apply the terms of the collective agreement to both the ICI and *non-ICI* projects in which it had been engaged. There was no question that the company was bound to apply the provincial ICI agreement to ICI projects. The statute required it. However, the union claimed that, in addition, there had been an irrevocable assignment of bargaining authority to MIECO in respect of non-ICI work, so that the company was bound to apply the MIECO provincial agreement to these sectors as well.

10. The Board disagreed. The Board found that Jantz was neither a member of MIECO nor had assigned its bargaining rights to MIECO. MIECO did not have the actual or ostensible authority to bargain on behalf of the company except in the ICI sector. Nor had the union entered

into any new short form or other agreement with Jantz binding the company to the provincial arrangement. There was also evidence (individual notices to bargain, for example) that the union had recognized the bargaining independence of companies in the position of Jantz. The Board held that Jantz was bound by what MIECO negotiated for the ICI sector because that was what the statute provided, but Jantz retained its bargaining independence for other sectors unless such bargaining authority had been ceded to MIECO by joining that organization or by an express assignment of bargaining rights, or the company was content to voluntarily bind itself to what MIECO had bargained.

11. In *Jantz No. 1* the Board affirmed the company's right to bargain its own collective agreement for non-ICI projects. Implicit in that freedom, of course, is the possibility that the terms of the collective agreement, *including its term of operation*, might be different from the provincial ICI agreement. Indeed, the only reasonable inference from the company's position in the earlier case is that, in the company's view, if there were to be an agreement at all in respect of non-ICI work, it would have to be on terms more favourable than those contained in the provincial ICI agreement.

12. The situation from September 1981 to the present is somewhat unclear. Counsel for the company advised the Board of his understanding that Jantz had signed a further "short form" agreement for all non-ICI work for 1982-84 and the employees' evidence that they continued to pay union dues for most of this period is consistent with that assertion. On the other hand, it is agreed that since at least April of 1984, there has been no collective agreement covering non-ICI projects. Since that is the only kind of work in which the company has been engaged, Jantz has been effectively operating "non-union". Sometime in 1984, a trade union representative visited Mr. Jantz to urge him to sign a new "short form" agreement, but Mr. Jantz refused.

IV

13. The question before us is whether the applicants can seek termination of bargaining rights for *both* the ICI sector covered by the statutory provincial collective agreement *and* the non-ICI sectors where it is agreed there is no collective agreement. In both cases the application is "timely" because there can be no collective agreement bar (there being no collective agreement) outside the ICI sector, and the application was made within the last two months of the provincial ICI agreement. But can employees who have worked in the residential sector for many years under no collective agreement, terminate the union's bargaining rights in the ICI sector where they have not worked at all? The union argues that they should not be entitled to do so because *if* the company actually was engaged in ICI work, the applicants would not be the employees doing it. The applicants are not union members as the provincial ICI agreement requires, and would in all likelihood not be among those dispatched by the union from its out-of-work list to take up any available ICI work opportunities. The union argues, rhetorically: "Why should employees not actually in, or entitled to be in, the *ICI bargaining unit*, be able to terminate ICI bargaining rights?" This assertion, of course, pinpoints the real issue: in the circumstances of this case, does the term "bargaining unit" in section 57(2) of the Act encompass *both* ICI and non-ICI bargaining rights? To put it another way: since the imposition of provincial collective bargaining are there now two "bargaining units" one covering ICI construction and a second one covering other sectors, and can employees working in only one bargaining unit seek to terminate bargaining rights in the other one?

14. We should note parenthetically that despite the unique circumstances of the construction industry and its special statutory bargaining scheme, there is nothing particularly unusual about an employer's employees being grouped into two different bargaining units depending upon their work characteristics, nor is it unusual for employees to move from one bargaining unit to

another. The work force of an industrial employer is often divided into a "full-time" and "part-time" bargaining unit, with persons moving from one to the other depending upon the number of hours which they regularly work. Similarly, it is quite common for industrial employers to have an "office, clerical, technical" bargaining unit, separate and distinct from its "production" bargaining unit. A change in an employee's work responsibilities can move him/her from one bargaining unit to another. Although in particular cases there may be problems of characterization, the Board has generally held that employees who apply for termination of bargaining rights must actually be employed "in" the bargaining unit on the date of the application. Thus, a "part-time" employee could not seek termination of bargaining rights in the "full-time" unit, and *vice versa*. Similarly, in the construction industry the Board has held that an employee who applies for termination must be at work within the geographic area of the unit on the application date and must be employed in the trade or craft in the case of "craft" bargaining unit (see *Uni-Form Builders Ltd.*, [1968] OLRB Rep. April 60, *Howardess Clark Construction*, [1968] OLRB Rep. April 62, *Diplock Durable Floor Co.*, [1982] OLRB Rep. Aug. 1159 and *T. E. Leroux Contracting Ltd.*, [1982] OLRB Rep. Aug. 1204). The union argues that this approach is applicable here, and that since the applicants are not working in the "ICI bargaining unit" they cannot bring an application terminating ICI bargaining rights.

15. Are there two bargaining units - one for ICI and another for non-ICI construction? Did the passage of the 1978 amendments create a distinct provincial ICI bargaining unit leaving the parties free to maintain or establish residual bargaining units based upon craft, geographic or sectoral considerations? In answering that question, it may be useful to consider some of the provisions of the Act in a little more detail.

16. In general, the Act envisages that there shall be only one collective agreement at a time between a trade union and employer with respect to the employees in the bargaining unit defined in that collective agreement; moreover, in the construction industry, because of the transitory nature of employment relationships, an agreement can be negotiated even though there are no employees in the bargaining unit at the time the agreement is entered into (see sections 49 and 121 of the Act). Accordingly, there is nothing anomalous in the proposition advanced by the union that employees in the ICI sector and the non-ICI sectors may be in different bargaining units, or that the "ICI unit" could remain empty for some years without affecting the validity of the ICI agreement. Indeed, the right to bargain a separate agreement (asserted by the employer in *Fred Jantz No. 1*, and affirmed by the Board), suggests that there is a distinctive non-ICI bargaining unit separate from the provincial ICI unit and its associated provincial bargaining scheme. So does the possibility (perhaps likelihood) of two separate collective agreements with differing provisions and potentially different term of operation. If there were only one bargaining unit but two collective agreements, there would be an apparent conflict with section 49 and a potential difficulty in calculating the timeliness of a representation application since both sections 5 and 57 provide that such applications can only be made during the last two months of the collective agreement pertaining to an established bargaining unit. (See *infra*.) The fact that the parties can bargain, can seek conciliation or even engage in a strike/lockout in respect of the non-ICI sectors, merely reinforces the union's argument in the instant case that there are two separate bargaining units involved.

17. The same inference flows from the statutory provisions governing the acquisition and exercise of bargaining rights in the ICI sector.

18. Under sections 144(1) and 144(2), the initial bargaining unit for certification purposes encompasses all employees who would be bound by a provincial collective agreement (i.e., all employees in the ICI province-wide) together with all other employees of the employer in at least one appropriate geographic area. The result is that the initial bargaining unit for the purpose of

establishing the percentage of union supporters consists of a provincial ICI grouping plus one or more geographically defined “bubbles” for non-ICI employees. But the Board is then required to issue *two certificates*: one certificate confined to the ICI sector, and another *separate certificate* in relation to all other sectors in the appropriate geographic area. Thus, although the initial bargaining unit configuration can include both ICI and non-ICI employees for the purposes of establishing entitlement to certification, section 144 clearly establishes two separate bargaining relationships for ICI and non-ICI work. The initial unity of the bargaining unit becomes bifurcated into a “provincial ICI unit” and a separate bargaining unit covering non-ICI work.

19. We are reinforced in this view by the process of bargaining which follows the issuance of the two certificates, and by the statutory language governing that process. As we have already mentioned, the ICI bargaining is conducted at the provincial level by statutory bargaining agencies while (as the first *Fred Jantz* case established), non-ICI bargaining occurs directly between the employer and the local union representing his employees. There is nothing in the statute which ensures that the non-ICI agreement will be in the same terms as the provincial agreement, nor even that a non-ICI agreement will be successfully concluded. It is entirely possible for an employer’s workers to be on strike in respect of ICI work but not on strike on an employer’s residential projects.

20. The statutory scheme and the statutory language both suggest the separate identity of the “provincial unit”. Section 146 of the Act provides that the employer and employee bargaining agencies can make only one provincial agreement for each “provincial unit” that it represents. The duration of that agreement is prescribed by statute. It expires at the end of April every other year (as do all other ICI agreements). There is no such restriction on the non-ICI bargain. An ICI strike can only be called in accordance with section 148 and under section 149 the only persons entitled to cast a “strike vote relating to a *provincial bargaining unit*” or a vote to ratify a proposed agreement are “employees in the *provincial bargaining unit*” on the day the vote is conducted. In our view, the use of the terms “provincial unit” or “provincial bargaining unit” is not accidental. These provisions contemplate a provincial ICI unit separate and distinct from any other bargaining units of an employer’s employees. So do the timeliness restrictions on construction industry termination applications.

21. Upon the issuance of the two certificates under section 144, the employer is automatically “plugged in” to the provincial agreement by operation of law. Thereafter, insofar as ICI bargaining rights are concerned, the provincial ICI agreement covers the timeliness of any termination application brought pursuant to section 57(2). The “open period” for such application would be the two-month period immediately preceding the statutorily prescribed date when the agreement ceases to operate. Non-ICI bargaining rights, however, would be subject to termination pursuant to section 123(1) of the Act which reads as follows:

If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

It is entirely possible to challenge non-ICI bargaining rights long before such challenge would be timely for the provincial unit. Again, we note the use of the term “bargaining unit” in section 123, which suggests that there are two units for which bargaining rights can be terminated, at different times, by separate applications.

22. There are at least two Board decisions which support the same conclusion - one of which is quite similar to the present case. In *Jan Peters Ltd.*, [1980] OLRB Rep. May 714, the

Board directed a representation vote only among the employees in the provincial ICI unit because it found that the application was untimely in respect of the other sectors. Similarly, in *Malen Steel and Salvage Company Limited*, [1978] OLRB Rep. May 435, the Board directed a representation vote only in the ICI sector because the “displacement” certification application in that case was only timely for the employees employed in the ICI sector of a multi-sector collective agreement. In *Stuart Riel Masonry Contractor*, [1984] OLRB Rep. Nov. 1630, the union’s bargaining rights for the provincial unit were based upon the ICI agreement and for other sectors in the construction industry were described in a Board certificate issued three years before. As in the present case there was no agreement covering non-ICI work and the termination application was timely for both; but the question was whether employees working on non-ICI projects could terminate bargaining rights attaching to the then empty ICI bargaining unit. The Board held that they could not, because in order to bring a termination application, the applicant employees had to be in the bargaining unit. The Board recognized that the right to terminate bargaining rights or change bargaining agents could depend, rather unpredictably, on the number and identity of the employee complement on a particular day together with where they were working. However, this was inevitably the case in an industry where employment levels fluctuate and employees move from job to job or employer to employer in search of work.

23. We recognize that in the instant case the union’s bargaining rights pre-existed the provincial bargaining scheme. A provincial multi-sector agreement and bargaining relationship was in place prior to 1978. Accordingly, prior to 1978, one could plausibly say that there was a single provincial, multi-sector, bargaining unit. However, we do not think that that position can be maintained after the introduction of the provincial bargaining scheme which created, in law, a separate provincial ICI bargaining unit with particular characteristics and a special set of bargaining rules. What remained was another provincial bargaining unit comprising all employees of Jantz working in sectors other than ICI. The parties were entitled to bargain a separate collective agreement for that bargaining unit - as the union tried unsuccessfully to do - but the fact that it was unable to do so and neither sought conciliation nor called a strike of workers on the non-ICI projects does not, in our view, alter the fact that after 1978 those employees were in a separate bargaining unit.

24. Counsel for the employer argues, quite persuasively, that the process by which bargaining rights are acquired or terminated should be the same, and points to the decision of the Board in *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1739. In that case, the Board was dealing with a certification application made pursuant to section 144, and held that a union could acquire bargaining rights for both the provincial ICI unit and one or more “non-ICI bubbles”, even though the employer did not have anyone working on an ICI project at the time the application was made. Counsel argues that if it is unnecessary to have employees working in the ICI sector at the time bargaining rights are acquired for that sector, it should not be necessary to have employees working in the ICI sector for the purpose of terminating ICI bargaining rights. Counsel for the employer drew the Board’s attention to paragraph 7 of the Board’s reasoning in *Colonist Homes* where the Board commented:

We find persuasive the applicant’s contention that the amendments to the Act resulting in the current wording of section 131(a) [now section 144] were not meant to either result in a trade union acquiring fewer bargaining rights in a Board area than it would have prior to May 1st, 1980, or to require that a determination be made in each case as to what sector employees are working in within the relevant Board area.

Counsel argues that, to the extent that the Board was concerned about making sector determinations in representation cases, that concern is equally relevant here; and, to the extent that the Board sought to interpret the new legislation so as not to diminish the extent of the bargaining rights which the Board could have acquired prior to 1978, the converse should also apply. The stat-

ute should not be interpreted so as to *diminish* the extent of the bargaining rights which could be terminated by a timely application. Counsel points out that if such application had been made in a timely fashion prior to 1978, the union's province-wide, multi-sector rights could have been terminated by a single application supported by the requisite number of employees - regardless of the sector in which they were working at the time.

25. An appeal for symmetry always has some attraction, but the fact is, that the mechanisms for acquiring and terminating bargaining rights are not the same. On an application for certification the Board determines the appropriate bargaining unit and, in many cases, can issue a certificate establishing bargaining rights without recourse to a representation vote. In a termination application the bargaining unit is the one which the parties have defined in their collective agreement and that unit may or may not be the same as, or find its origin in, a Board certificate issued some time before; moreover, unless the union voluntarily relinquishes its rights, bargaining rights can only be terminated by a representation vote. It is simply wrong to assume that bargaining rights must be acquired and lost in precisely the same way.

26. Similarly, it is quite wrong to expect that the Board's interpretation of section 144 of the Act will necessarily govern its interpretation of section 57. A reading of the Board's decision in *Colonist Homes* indicates, quite clearly, that the Board was influenced not only by policy considerations, but also by the language of section 131(a) [now section 144] itself which had recently been amended to make it clear that an application could be made under that section "relating to" the ICI sector, even though there were no individuals "employed in" the ICI sector at the time the application was made. At paragraph 8, the Board observed:

We have also taken into account the Legislative history of section 131a [now section 144] originally enacted (S.O. 1979, c.113, s.2) section 131(1) read as follows:

An application for certification as bargaining agent *for the employees of an employer employed in the industrial, commercial and institutional sector* of the construction industry referred to in clause e of section 106 may only be brought by a designated or certified employee bargaining agency on behalf of all the affiliated bargaining agents it represents, and the unit of employees that is appropriate for collective bargaining shall be those employees who would be bound by a provincial agreement.

[emphasis added]

It is apparent that apart altogether from policy or practical considerations, the Board was drawn to its result by the recent changes to the language of the statute which implied that the presence of employees in the ICI sector was not a prerequisite to a certification application and certificate "relating to" the ICI sector. There has been no similar evolution of section 57 of the Act, nor is there any reason to discount the compelling inference from the scheme of the Act that ICI and non-ICI employees are now in different bargaining units which are subject to a different regulatory scheme. Indeed, the differences in the collective bargaining regime are much more profound than would exist between a "full-time" or "part-time" bargaining unit, or between an "office/clerical" or "plant production" bargaining unit.

27. For the foregoing reasons, the Board finds that the company currently has two bargaining units: one including all craftsmen ordinarily represented by the union in the ICI sector (i.e., bricklayers, stonemasons and plasterers, their respective apprentices, improvers and working foremen) and a separate unit comprising the same craft grouping of employees who work outside the ICI sector - in the present case on residential projects. We find that, at the time the application was made, there were no employees in the provincial ICI bargaining unit and, hence, no one entitled to bring a termination application and no "ICI employees" whose views should be canvassed before

determining the disposition of such application. On the other hand, the employer did have workers outside the ICI sector who were entitled to bring this timely termination application, and in respect of those employees the union has indicated that it does not seek to maintain bargaining rights. In the circumstances, pursuant to section 57(5) of the Act, the union's bargaining rights are hereby terminated insofar as they relate to bricklayers, stonemasons, plasterers, their respective apprentices, improvers, and working foremen employed by the company other than in the ICI sector of the construction industry. Since there are no employees currently in the provincial ICI bargaining unit and, on the evidence, there have not been employees in the provincial ICI bargaining unit for some years, this termination application must be dismissed insofar as it relates to the ICI sector.

DECISION OF BOARD MEMBER R. J. GALLIVAN;

1. While the majority's decision appears to be in accord with Board practice, the circumstances of this case clearly illustrate that that practice is wrong since it violates the fundamental purpose of the *Labour Relations Act*. As the Board is so fond of reminding the industrial relations community, the purpose of the Act as set out in its preamble is to further collective bargaining between employers and trade unions. There is, however, a very important codicil attached to the preamble which states that the trade unions which engage in collective bargaining must be "... the freely designated representatives of employees." The majority's decision overlooks that fundamental qualifier.

2. The employees of this company no longer wish to be represented by a union. They are the only currently unionized employees of this employer. In applying for decertification they have not said "we wish to be union-free only when our employer is doing residential construction." They have said "we wish to be union-free, period." Yet their right to work non-union in the ICI sector is denied to them by this Board for if their employer were to undertake a project in the ICI sector these employees would be forced to become union members once again in order to work on such a project for their employer. That hardly squares with employees' freedom to join or not to join a union of their choice.

3. Under section 144 of the Act the Board issues two certificates for the same group of employees - one in respect of ICI construction work province-wide, and a separate certificate covering all sectors in the appropriate geographic area, even though none of the employees may be working in the ICI sector at the time the certificates are issued. Decertification should occur similarly - not for purposes of symmetry but rather for consistency with the principle of recognizing the fundamental rights of employees to freely determine for themselves whether or not they wish to be represented by a union.

0937-86-R; 0938-86-R Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. 656508 Ontario Limited and **Gruyich Services Inc.**, a Limited Partnership, Respondent, v. Group of Employees, Objectors

Certification - Practice and Procedure - Representation Vote - Request by applicant that name be amended on certification application from Textile Workers to Laundry and Linen Workers - Request granted but representation vote ordered despite fact that membership evidence over fifty-five percent - Board canvassing instances when discretion exercised under s. 7(2) to order vote

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *F. W. Murray* and *B. L. Armstrong*.

APPEARANCES: *L. Steinberg* and *F. DaSilva* for the applicant; *Bruce Binning*, *James Knight*, *George Yerich Sr.*, *John Gruyich*, *George Yerich Jr.* and *Michael Gruyich* for the respondent; no one appearing for the objectors.

DECISION OF THE BOARD; July 31, 1986

1. The Board orders that these two applications be and the same are hereby consolidated.
2. Though properly notified of the time, date and place of the hearing, none of the group of employees objecting to these applications appeared at the hearing, either personally or through a representative.
3. On the original application the name of the applicant appeared as Textile Processors, Service Trades, Health Care, Technical and Professional Employees International Union Local 351. At the beginning of the hearing into these applications, the Board heard submissions from the parties with respect to a request by the applicant that its name be amended to "Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America". This request had previously been communicated to the Board and the respondent by letter dated and hand delivered July 21, 1986. It does not appear that a copy was delivered to the group of employee objectors other than through the Board's normal processes.
4. With respect to the amendments sought, the applicant's counsel submitted that there had been a *bona fide* mistake made in the naming of the applicant, which error arose out of some miscommunication between the applicant and its counsel's office, and which should be corrected by the Board in the exercise of its discretion under section 104 of the *Labour Relations Act*. We were told that Mr. DaSilva, who conducted the organizing campaign on which these applications are based, is the Director of Organizing for both the Textile Processors, Service Trades, Health Care, Technical and Professional Employees International Union Local 351 and the entity whose name the applicant now seeks to substitute therefor. Although the two organizations are separate entities, counsel submits that it was merely a matter of getting the name wrong and that there could be no possibility of any confusion in the minds of the employees as to who the applicant in fact is and which union it is that those who signed cards agreed to join. He points out that Local 351 had no presence whatsoever at any material time, that the cards signed and submitted as membership evidence in support of the application are headed Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America. He noted also that there is no complaint from any employee that any confusion exists as a result of the error. Further he advised the Board that the respondent had withdrawn the objection that it had made to that effect. Finally, the Board was urged to refrain from taking an overly technical approach in circumstances where there is no confusion. The applicant cited earlier decisions of the Board in *Food Corp. Limited*, [1983] OLRB Rep. May 636, *The Ottawa Journal Publishing Co.*, [1974] OLRB Rep. July 499, *Bluebell Canada Limited*, [1966] OLRB Rep. Feb. 809 and *Inland Publishing Co. Limited*, [1980] OLRB Rep. Dec. 1739.

5. For its part, the respondent confirmed that it had no cause to doubt what was said to be the source of the "error" and that it was withdrawing its objection and assertion of confusion. Not only did the respondent not oppose the applicant's request but counsel suggested that should the Board see fit to grant the same, it be noted as being on agreement of the parties.

6. After hearing the representations of the parties, the Board adjourned briefly to consider the matter. The Board then returned and gave the parties its oral decision as follows:

These are two applications for certification filed in the name of The Textile Processors, Service Trades, Health Care, Technical and Professional Employees International Union, Local 351. The applicant seeks to amend the application by changing that name to the Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The basis for the request to amend the name is that a *bona fide* clerical error resulted in the wrong entity being named as the applicant. It is submitted that inasmuch as the membership cards filed supporting the application are in the name of Local 847, which it is submitted is the real applicant, and there being no competing union organizing campaign, everyone knew who the applicant in fact was. It is also submitted that there is no evidence of any confusion that has resulted from the error and that there is no indication of any prejudice that would result to anyone if the Board makes the change requested. Finally, we are urged to apply section 104 of the Act which gives the Board a discretion to correct a *bona fide* mistake in the naming of a party's proceedings before it. We are told that to refuse to grant the request would be overly technical particularly where there is no suggestion or possibility of any confusion. We are referred to a number of previous decisions of the Board including *Food Corp. Limited*, [1983] OLRB Rep. May 636 and *Inland Publishing Co. Limited*, [1980] OLRB Rep. Dec. 1739.

The respondent does not oppose the request of the applicant and indeed suggests that if the Board is inclined to accept it, it be noted as being on agreement of the parties.

The Board has had some difficulty with the applicant's request given the degree of the difference between the two names. It is not entirely clear to the Board that there is no possibility of confusion among the employees. However, having regard to the nature of the change, the manner in which it arose, the prior decisions of the Board, the relevant labour relations considerations, and the agreement of the parties, the Board grants the applicant's request and orders that the name of the applicant be amended accordingly.

However, the Board would like to hear from the parties in due course with respect to whether or not the Board should exercise its discretion under section 7(2) of the Act to require a representation vote even if the applicant enjoys membership support in excess of fifty-five per cent of the employees in the bargaining unit.

7. In the result the name of the applicant is amended to read "Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America".

8. The name of the respondent is amended to read "656508 Ontario Limited and Gruyich Services Inc., a Limited Partnership".

9. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

10. With respect to the full-time unit (Board File No. 0937-86-R), hereinafter referred to as bargaining unit #1, and having regard to the agreement of the parties, the Board finds that all employees of the respondent in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. With respect to the part-time unit (Board File No. 0938-86-R), hereinafter referred to as bargaining unit #2, and having regard to the agreement of the parties, the Board finds that all employees of the respondent in the City of Niagara Falls regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The terminal date fixed for these applications was July 15, 1986 and that is the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

13. With respect to bargaining unit #1 the information filed by the respondent indicates that there are 131 employees in the unit. The applicant filed 149 combination applications and receipt cards indicating membership in the trade union on the terminal date. Of these 149, there are 71 cards which coincide with the 131 names on the list of bargaining unit employees and which cards are, in their form and content, consistent with the requirements of section 1(1)(l) of the Act. Standing alone, this demonstrates that the union has the support of more than forty-five per cent but less than fifty-five per cent of bargaining unit employees and is therefore, pursuant to section 7(2) of the Act, in a vote position. In addition, however, the applicant wishes to make fifteen challenges to the respondent's list of bargaining unit employees in that it claims that these fifteen employees who have not been included thereon should be. With the challenges included for the purposes of the count, there would be 146 employees in bargaining unit #1, of which 86 would be members of the would be applicant. Consequently, if the applicant is successful in two or more of its challenges, it would be in a position to be certified without the necessity of a representation vote pursuant to section 7(2) of the Act unless the Board exercised its discretion to order such a vote in any event.

14. With respect to bargaining unit #2, the applicant seeks leave of the Board to withdraw its application. Having regard to the stage of the proceedings at which the request was made, the

Board denies the leave requested and the application in Board File No. 0938-86-R is hereby dismissed.

15. The Board then asked the respondent to clarify the status of the allegations of improper conduct made against the applicant in a three-page letter dated July 24, 1986 and hand delivered that same day. In the course of his submissions, counsel for the respondent indicated that some of the allegations were no longer being relied upon while others were going to be maintained. In view of the ultimate disposition of the matter by the Board, however, there is no need to deal with these submissions or those of the applicant on the issue, further. Suffice it to say that these allegations did not form a part of the basis of the Board's decision.

16. The Board also requested submissions from the parties with respect to whether or not a vote should be ordered immediately, having regard to the circumstances and to the desirability of having the matter dealt with in an expeditious manner. On this issue, counsel for the applicant submitted that there is neither a confusion among the bargaining unit employees nor anything else to cloud the membership evidence filed by the applicant such as to justify the ordering of a representation vote. He suggests that the Board ought not to order a vote unless it has doubt as to the true wishes of the employees and that there is nothing in the evidence before the Board that is sufficient to raise such a doubt. The respondent submits that a vote should be held in order to ensure the true wishes of the employees are ascertained.

17. The scheme of the *Labour Relations Act* makes the documentary evidence filed by a trade union in support of an application for certification the primary basis upon which the wishes of the affected employees are gauged. The Board does not solicit *viva voce* opinions regarding the virtue, or lack of virtue, in union representation. Representation votes are a residual mechanism for use in circumstances where the trade union either cannot demonstrate clear majority support (i.e. more than 55%) or where the circumstances and the particular application call for one. Consequently, evidence of membership of fifty-five per cent or more of the employees in the bargaining unit will normally entitle an applicant trade union to certification without the additional step of a representation vote. Section 7 of the Act provides:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

18. However, as is evident from section 7(2) of the Act, the Board retains a discretion to order a representation vote even where there is satisfactory evidence of membership in excess of 55 per cent. The legislation accommodates the possibility that circumstances other than the membership "count" may, in a particular case, make trade union membership less reliable as a measure of the employees' desire to be represented by a trade union. This discretion constitutes an important safeguard for employee wishes, but in exercising it the Board must recognize the balance struck by the Legislature in emphasizing membership evidence as the primary means of determining employee wishes. Consequently, the Board has exercised its discretion under section 7(2) of the Act only for compelling reasons. (See *Unlimited Textures*, [1984] OLRB Rep. Jan. 138 at para-

graph 15, *Walbar of Canada Inc.*, [1982] OLRB Rep. Nov. 1734 at paragraph 17, *Cleveland-Cae Metal Abrasive Limited*, [1979] OLRB Rep. Feb. 81 at paragraph 8, *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387 at paragraph 49).

19. One of the factors that the Board normally takes into account when requiring a vote even where more than 55 per cent of the employees have joined the trade union, is the existence of a timely statement of desire or petition. In this situation, several such petitions were delivered in a timely manner but the objectors did not attend at the hearing of the matter and there is therefore no evidence before the Board regarding the voluntariness thereof. Consequently, these documents are not relevant to the Board's considerations. Other factors normally taken into account by the Board include the age of the membership evidence (see *Primo Importing and Distributing Co. Ltd.*, [1981] OLRB Rep. July 953), and the actions of the applicant, including indicating that certification would not take place without a representation vote (see *Carleton University*, [1975] OLRB Rep. Apr. 308), impeding circulation of a petition by intimidation or coercion (see *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. Apr. 346, or the existence of coercion or intimidation in the collection of the membership evidence itself (see for example *PRC Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. Dec. 1805). This list, though illustrative, is not exhaustive and the Board's discretion under section 7(2) is both unfettered and one on which no arbitrary limits can be placed. The Board must take into account, not only the membership evidence filed, but all of the relevant circumstances in determining whether or not to exercise its discretion to order a representation vote.

20. In this particular instance the Board remains troubled by the inability of the applicant to get its name right on the application for certification to the extent that an entirely separate and different entity was originally named as the applicant. This mistake, albeit *bona fide*, is nevertheless rather extreme for a clerical error. It resulted in all of the Board's notices (including the Form 6 posting) by which both the respondent and the employees are given notice of the application, being issued with what is effectively the wrong entity noted as being the applicant. In addition, it was only four days prior to the hearing of the matter (17 days after the date of filing of the application) that the applicant sought to rectify the situation. We do not know what, if any, notice the employees actually received of this and we have no information as to what impact, if any, it might have had on them. We are, however, left in some doubt as to whether the true nature of the application has been brought home to the employees. The membership evidence filed has on its face the name of the Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Can it be said that the employees assumed or understood that the notice that was posted related to the same matter as the membership cards that were signed? Perhaps, but we are left in some doubt. Finally, even if successful on all of its challenges, the documentary evidence of support would not be either overwhelming or such as to dispel this doubt. The object of the Form 6 posting is to ensure that the employees are given notice that there has been an application for certification and of the essential details relating thereto. If they wish they can then pursue the matter further. Surely, a significant "detail" is the name of the actual applicant. Surely it is neither overly technical, nor too much to ask of an applicant for bargaining rights, that it get its own name right. In such circumstances the responsibility for such an error lies solely with the applicant.

21. Consequently, the Board advised the parties, in an oral decision given at the hearing, that even if the applicant is successful in a sufficient number of his challenges to the employer's list to raise the membership support to over 55 per cent of the employees in the bargaining unit, we are of the view that, in the circumstance of this case, a vote should be held.

22. The Board therefore directs the appointment of a Labour Relations Officer to enquire

into the duties, responsibilities, and status of those persons being challenged by the applicant as having been improperly excluded from the list of employees in bargaining unit #1 by the respondent and to report to the Board with respect thereto. Specifically the names of the persons about whose inclusion in the bargaining unit the parties cannot agree and with respect to whom the Officer is to enquire are: Richard Chan; Hussein Rashid; Kenneth Weiss; Manoucher Farahbakhsh; Donna Giles; Margaret Hurley; Eveline Watt; Terry Heeney; Nick DeGazio; Cary Scott; Melissa Bishop; Patricia Ciano; Michel Bockus; Lorri L. Virag; B. Dickinson.

23. The Board further directs that a representation vote be held with respect to bargaining unit #1. A Labour Relations Officer is hereby appointed for the purposes for completing the necessary vote arrangements.

24. All the employees in bargaining unit #1 on July 25, 1986 and the 15 persons whose inclusion in the bargaining unit is the subject of the dispute between the parties who do not voluntarily terminate their employment or who are not discharged for cause between July 25, 1986 and the date of the vote will be eligible to vote. The ballots of the 15 persons in dispute are to be segregated in the usual way. (The Board notes that there is an agreed voters' list in the Board's file.) Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

25. The matter is referred to the Registrar.

0793-86-R Alan Gagnon, Applicant, v. International Union of Operating Engineers, Local 793, Respondent

Construction Industry - Termination - Timeliness - Conflict between construction industry and general termination provisions - Whether time limits relating to conciliation and one year shelter period applicable to construction industry - Sections 57 and 61 modified by six-month period in section 123

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *F. W. Murray* and *R. R. Montague*.

APPEARANCES: *Michael S. F. Watson* and *Alan Gagnon* for the applicant; *Bernard Fishbein*, *E. A. Ford* and *P. Bertrand* for the respondent.

DECISION OF THE BOARD; August 8, 1986

1. This is an application for a declaration terminating bargaining rights, pursuant to the provisions of section 123(1) of the *Labour Relations Act*. Section 123 provides:

123.-(1) If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Notwithstanding subsection 57(2), any of the employees in the bargaining unit defined in a first agreement between an employer and a trade union, where the trade union has not been

certified as the bargaining agent of the employees of the employer in the bargaining unit, may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit after the 305th day of its operation and before the 365th day of its operation.

(3) Subsections 57(3) to (6) apply to an application under subsection (1) or (2).

2. On October 21, 1985, the respondent was certified as bargaining agent for two units of employees of Colautti Construction Ltd., pursuant to section 144(1) of the Act. It is agreed that Colautti Construction has employed only non-"I.C.I." employees since that time, and the present application applies only to the non-"I.C.I." bargaining unit certified by the Board. A conciliation officer had been appointed for this bargaining unit on January 16, 1986, and a "no-board" report issued February 27, 1986. The present application was filed on June 18, 1986. The preliminary position taken by the respondent is that the application is untimely, and that is the issue which this decision must address.

3. It must be noted that this application, pertaining as it does to the construction industry, was properly filed under section 123 of the Act, rather than section 57 of the Act, which applies to "non-construction" situations. Section 57(1) reads:

57.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

In comparing the two sections, one is struck by the similarity of their wording and apparent application, the significant difference being that a union's bargaining rights, under section 57(1), are protected from a termination application for a period of a year, while under the construction industry provision, they are stated to be protected for six months. Section 123, with its six-month provision, was put into the Act in 1961, along with the other "construction-industry" provisions of the Act. See S.O. 1961-62, c.68. At that time section 57 was already in the Act, with its one-year time period.

4. It must be noted that nowhere in the "construction" provisions of the Act does it say that the "general" provisions of the Act do not apply. Rather, the matter is dealt with as a question of override or "conflict", in section 118, which reads:

Where there is conflict between any provision in sections 119 to 136 and any provision in sections 5 to 57 and 62 to 116, the provisions in sections 119 to 136 prevail.

5. The critical question in this case is the application of section 61, and in particular 61(1):

61.-(1) Subject to subsection (3), where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made until,

- (a) thirty days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator; or
- (b) thirty days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board; or
- (c) six months have elapsed after the Minister has released to the parties a

notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled,

as the case may be.

The present application was filed more than 30 days after the conciliation process referred to in section 63(1)(b) had been completed. The applicant can freely concede, therefore, in line with earlier jurisprudence of the Board, that the “conciliation” provisions of section 61(1) apply to a construction-industry application: the present application would still be timely. The respondent argues, however, that all of section 61(1) applies to the construction industry, and more specifically, that a union’s bargaining rights in the construction industry are protected from a termination application for a minimum period of one year.

6. The only case of the Board to fully consider the relationship between the sections now before us is *K. J. Beamish Construction*, [1967] OLRB Rep. May 205. In that case the facts themselves were significantly different, in that although that termination application was also brought between six and twelve months after certification, the conciliation process was still ongoing. Section 123 makes no reference to the conciliation process at all, and the applicant in that case argued that, particularly in light of the “paramountcy” provisions of what is now section 118, section 123 set out the only test for timeliness (i.e., six months from certification). Faced with the prospect that the conciliation process in the construction industry could be interrupted in midstream by a termination application, the Board reasoned as follows, at page 211:

Section 96 [now 123] provides that if a trade union does not make a collective agreement within six months after its certification, any of the employees may apply for a declaration that the union no longer represents the employees. It is significant that section 91 [now 118] does not say that sections 5 to 89 shall not apply to the construction industry but declared merely that where there is a conflict between *any provisions* in sections 92 to 96 and *any provisions* in sections 5 to 89 *the provisions* in sections 92 to 96 shall prevail. The plain meaning to be drawn from the language of section 91, therefore, is that where there is a conflict in any of the provisions of section 5 to 89 with any of the provisions of sections 92 to 96, the former sections, less whatever parts of them conflict with the latter, shall, if reasonably capable of pertaining to the subject-matter, apply *mutatis mutandis* to the construction industry.

Comparing the time limits provided in the general provisions with those in the construction industry part of the Act, the Board then wrote, again at page 211:

Section 46(1) [now 61(1)] provides that where a trade union has not made a collective agreement within one year after its certification and notice has been given under section 11 and the Minister has appointed a conciliation officer or mediator, no application for a declaration that the trade union no longer represents the employees in the bargaining unit determined in the certificate shall be made unless the conciliation process has been exhausted and the additional period of thirty days has gone by as provided for in either clause (a) or (b) of the section. Obviously, the only provision of section 46(1) which appears to conflict with section 96 [123] is the one year period. Section 91 [118], however, states that where there is such a conflict the provisions of section 96 are to prevail. It is manifest that if the period of six months provided for in section 96(1) is, following the direction of section 91, allowed to prevail and is, accordingly, substituted in section 46(1) for the one year period stated therein, any conflict existing between sections 96(1) and 46(1) (a) and (b) is automatically reconciled, with the result that the two sections may then co-exist and operate in harmony.

And, further, at page 212:

... It is obviously more compatible with legislative consistency and with the policy and sense of the legislation when read as a whole, that sections 45 and 46 were intended to complement and not to conflict with section 96. It is obvious that the provisions of sections 91, 93, 96, and 46, readily lend themselves to an interpretation which on the one hand permits them to co-exist in

harmony and on the other manifestly serves to promote and advance the plain spirit and object of the legislation as a whole (i.e., to foster the conciliation process).

The application was accordingly dismissed.

7. What that case decided was that the one-year period referred to in section 61(1) was to be read, for construction applications under section 123, as a six-month period, and that the *additional* time limits relating to completion of the process of conciliation were applicable to the construction industry as well, and could, as in non-construction industries, extend the time during which bargaining rights are protected. On the facts of that case, Mr. Fishbein for the applicant argued that the first of those conclusions by the Board was *obiter*, and ought now to be disregarded. In support of that submission, he points out that section 91 [now 118] has since been amended to its present form, which specifically *omits* section 61, *inter alia*, from 118's repugnancy declaration. Section 91 read:

91. Where there is conflict between any provision in sections 92 [now 119] to 96 [now 123] and any provision in sections 5 to 89 [now 101], the provisions in sections 92 to 96 prevail.

and as section 118 now reads:

Where there is conflict between any provision in sections 119 to 136 and any provision in sections 5 to 57 and 62 to 116, the provisions in sections 119 to 136 prevail.

Mr. Fishbein accordingly argued that section 61 can no longer be read to be qualified by section 123 at all, and that both the time limits relating to conciliation *and* the one-year period must be said to be applicable to the construction industry.

8. Mr. Fishbein provided a number of answers to the obvious questions posed by the Board. Why would there continue to be an express provision (section 123) in the Act setting a period of six months for "sheltering", if it was simply going to be overridden entirely by section 61? Mr. Fishbein's response is that section 123 is a "no-activity" section: it only exposes a trade union to jeopardy for its bargaining rights when six months have gone by and it has not even applied for conciliation. But, the Board asked, if section 123 is then in effect an "abandonment" section, why was such felt necessary in light of the applicability of section 59 to both construction and non-construction alike? Section 59 provides:

59.-(1) If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

Mr. Fishbein's response is that section 59 can be avoided indefinitely, without exposing oneself to economic sanctions by applying for conciliation, simply by agreeing to meet once every 60 days; section 123 puts an upper limit of six months on such activity. And in return, Mr. Fishbein asks what policy reason there could be for the Legislature to give a trade union in the construction industry *less* time than in other sections to make a collective agreement before being exposed to

termination, particularly when the intervention of winter may render resort to economic sanctions ineffective during that period of time.

9. We have considered the carefully-reasoned submissions of Mr. Fishbein, and acknowledge that he has succeeded in putting forward an interpretation of the various sections that is possible. On a plain reading of the language used by the Legislature, however, we must conclude that the scheme of the Act put forward by Mr. Watson for the applicant is the more plausible.

10. Section 57(1) and section 123(1) are clearly the corresponding provisions for the “general” versus “construction” portions of the Act. We cannot be certain why the Legislature chose to use a general framework of one year for non-construction and six months for construction; it may be that the same concern over the latter’s ephemeral nature which motivated speedy arbitration by the Board under section 124 motivated the abridgement of time limits under section 123. But in any event, section 123 appears to reflect a deliberate decision on the part of the Legislature to do so. That decision was recognized and acknowledged by the Board in *K. J. Beamish, supra*. So the real question is whether the amendment to [now section 118] in 1966, omitting a series of sections which included section 61, should be read as a legislative intent to reverse the “*obiter*” in *Beamish*.

11. The question of this 1966 amendment came before the Board in *Village Contractors*, [1967] OLRB Rep. June 277. There, however, the problem once again was the fact that the parties were in the midst of conciliation. The Board wrote, at page 278:

It is clear that the present application is untimely, having regard to the provisions of section 46 [61](1) of the Act. For the reasons given in the *K. J. Beamish Construction Company Case*, Board File No. 10646-65-R, it is our view that the provisions of section 46 of the Labour Relations Act apply with respect to this application. Even though the application would otherwise have been timely, having regard to the provisions of section 96 [123] of the Act, it may be noted that section 91 [118] of the Act now reads as follows:

Where there is conflict between any provision in sections 92 to 96 and any provision in sections 5 to 43 and 47 to 88, the provisions in section 92 to 96 prevail. 1961-62, c. 68, s. 16, *Part*; 1966 c. 76 s. 38.

Section 46 is not referred to in section 91 and is not a provision against which the provisions of sections 92 to 96 would prevail if indeed there were any conflict between section 46 and any of the provisions of sections 92 to 96. In our view, the amendment to section 91 adds force to the reasoning set out in the *Beamish Case*.

As can be seen, the Board once again did not have to turn its mind specifically to the question of the one-year period. But we do note that the Board saw nothing in the amendment to section 118 to cause it to disagree with the manner in which *Beamish* felt the various sections were to be read together.

12. The respondent’s biggest problem is that section 61(1) is *not* the source of the one-year “shelter” period from non-construction termination applications. It simply states “where a trade union has not made a collective agreement within one year after its certification ...” The need for a one-year hiatus may be inferred from that, as Mr. Fishbein argues, but the actual source of that hiatus is section 57. And the corresponding section to section 57 in construction, once again, is section 123. Section 123(1) clearly overrides section 57(1), pursuant to the provisions of section 118 (the portions of section 57 which are *not* affected by section 123 are expressly set out in section 123(3)).

13. The respondent relies on a statement of the Board in *Canron Limited*, [1977] OLRB

Rep. June 336, to support its argument that section 61 is a timeliness section which stands on its own, independent of section 57. That statement is in paragraph 8:

... It is clear from the wording of subsection [61](1) that it is that subsection which sets forth *the general rules* concerning the timeliness of applications to displace a certified union which has not entered into a collective agreement, and that subsection (3) acts as but an exception to those rules.

[emphasis added]

But it would appear the Board there, in considering, as it was, the effect of a *strike* on timeliness, was merely placing in perspective section 61(1) versus 61(3), in terms of the overall scheme of that section. That becomes clearer when one reads the *Ontario Hospital Association* case, [1980] OLRB Rep. July 1036, where the same Vice-Chairman wrote:

6. Subject to section 53 [61], section 49(1) [57(1)] of the Act has the effect of ensuring that a trade union will be given a full year from the date of this certification in which to seek to negotiate a first collective agreement free from any timely attempts to terminate its bargaining rights. Section 53(1) provides an exception to this general time period by ensuring that this one year period will, if necessary, be extended so that a union's immunity from a timely termination application will be continued during the conciliation process and for a further period of thirty days thereafter. It is clear on the face that section 53(1) can only serve to extend the one year period, and cannot reduce the period to less than a year. Section 53(3), which only comes into play where employees engage in a lawful strike, provides yet another exception to the general time limit set out in section 49(1). Although section 53(3) does not on its face state that it can only serve to expand, and not contract, the one year period of protection accorded to a newly certified union, having regard to the clear intent manifested by section 49(1) and section 53(1) of providing for such a one year period, we are satisfied that section 53(3) should not be interpreted so as to allow this time span to be shortened. We would note that this conclusion appears to be consistent with the reasoning of the Board in the *Canron Limited* case, [1977] OLRB Rep. June 336.

14. The applicant argues that the sections which were deleted from section 118 were so deleted because there was no possibility of conflict. Section 58 deals with obtaining certificates by fraud, section 59 with termination of bargaining rights for delay, and section 60 for challenging a voluntary recognition or collective agreement in its first year. With respect to section 61, Mr. Watson submits the Legislature was satisfied with the interpretation in *Beamish*, and had covered section 61 in any event by at the same time amending section 57 to say "subject to section 61". Sections 57 and 61, it is submitted, must therefore be read as one section in order to get the full picture on timeliness, and section 123 clearly overrides section 57 with respect to the six-month period. Section 61(1) is then read *mutatis mutandis*, in exactly the way the Board in *Beamish* said that it was.

15. Once again, we accept that interpretation as the most plausible and consistent with the language. Sections 57 and 61 clearly *do* have to be read together to get the full proscription on premature applications, and it is logical to read section 118 as causing section 57 and hence the preamble in 61 to be modified by the six-month time frame chosen by the Legislature for section 123 applications, just as the Board in *Beamish* appears to have done. The 1966 round of amendments were closely related in time to the conclusions of the Board in *Beamish*, and had the Board misread the fundamental intent of the Legislature in *Beamish*, one would have anticipated a more direct form of amendment than the deletion of section 61, *inter alia*, from section 118. That deletion, in fact, may have been no more than what the Board in *Village Contractors* took it to be, "reinforcement" of the approach of the Board in *Beamish*, and insulation of its conclusions (as to the conciliation procedure in particular) from possible judicial review. It was, again, the inclusion of section 61 in the forerunner to section 118, and hence the "override" of it by section 123, which

opened up the argument that six months from certification was the *only* time limit. While the attention of everyone at that time was clearly on the application to the construction industry of section 61's conciliation-sensitive time limits, the Board's broad interpretation of the integration of sections 123, 57 and 61 cannot have escaped the Legislature's attention, and may be taken to have been endorsed by it in removing the problem the Board in *Beamish* was faced with under section 118.

16. Mr. Fishbein submits, further in that regard, that the community's understanding since the 1966 amendments has been that bargaining rights in the construction industry are protected for a minimum one-year period, and cites Sack & Mitchell, *Ontario Labour Relations Board Law and Practice*, 1985 Butterworth & Co. (Canada) Ltd. in support. However, that text in fact states, at 10:3100:

The times relating to termination applications outside the construction industry under s.57 are in part abridged in construction industry applications. A termination application may be made by an employee in the unit if a collective agreement has not been made within six months after certification: s.123(1). In the case of a first agreement where the union has not been certified, in addition to the provisions of s.60, a termination application may be made by an employee in the unit after the 305th day and before the 365th day of its operation: s.123(2). Subject to the above, the regular termination provisions of the Act apply to the construction industry; and the time limits set out in s.61 apply to termination applications made under s.123....

[footnotes omitted]

and cites *Beamish* as the authority. It would appear, therefore, that not even the authority cited by Mr. Fishbein offers unequivocal support for his proposition.

17. On the basis of all of the foregoing, we are constrained to find that the scheme of the Act is to substitute for the construction industry a six-month period following certification for insulation of a trade union's bargaining rights from termination applications, subject to any extension that the conciliation-related time limits in section 61(1)(a), (b) and (c) might bring.

18. On the facts before us therefore, the application, having been filed outside the six-month period, and more than 30 days after the exhaustion of the conciliation process, is timely.

19. The matter is referred to the Registrar for the scheduling of a hearing to inquire into the voluntariness of the application, and its accompanying statements. As the matter is of some urgency, we note the understanding of the parties that this panel has not become seized with the issue of voluntariness. The Registrar is directed to consult with the parties on the setting of a hearing date, but may set the date on a peremptory basis if agreement cannot be reached on a date within two months of the date hereof.

0911-86-U; 0998-86-U; 0868-86-U The Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto, Frank Michelucci, Derwent Lewis, and Jack McCarron, Complainants, v. Sean O’Ryan; The United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, Local 46; Metropolitan Plumbing Contractors Association; Urban Mechanical Contractors Limited; Zentil Plumbing and Heating Co. Ltd.; Lou Pupolin Plumbing & Heating Co. Ltd.; Brady & Seidner Ltd.; DiMarco Plumbing & Heating Co. Ltd.; Keele Plumbing & Heating Ltd.; Municipal Plumbing & Heating Ltd.; Cesan Mechanical Systems Ltd.; D. Zentil Mechanical Ltd., Respondents; Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto, Applicant, v. Sean O’Ryan; The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46; Urban Mechanical Contractors Limited; Zentil Plumbing and Heating Co. Ltd.; Lou Pupolin Plumbing & Heating Co. Ltd.; Brady & Seidner Ltd.; DiMarco Plumbing & Heating Co. Ltd.; Keele Plumbing & Heating Ltd.; Municipal Plumbing & Heating Ltd., Respondents

Natural Justice - Practice and Procedure - Board member executive director of council that co-ordinates bargaining in the ICI sector of the construction industry - Propriety of co-ordinated collective bargaining as it affects bargaining in residential sector of construction industry significant issue in case - Whether Board member should be removed from panel - Whether reasonable apprehension of bias

BEFORE: *Harry Freedman*, Vice-Chairman and Board Members *M. Eayrs* and *N. Wilson*.

APPEARANCES: *G. Grossman*, *S. C. Bernardo*, *W. J. McCarron* and *D. Lewis* on behalf of the complainants/applicant; *M. E. Geiger*, *Howard Roher*, *Edward J. Winter* and *Martin Rosenbaum* on behalf of Metropolitan Plumbing Contractors Association, Urban Mechanical Contractors Limited, Zentil Plumbing and Heating Co. Ltd., Lou Pupolin Plumbing and Heating Ltd., Keele Plumbing and Heating Ltd., DiMarco Plumbing and Heating Co. Ltd., Municipal Plumbing and Heating Ltd., Cesan Mechanical Systems Ltd., D. Zentil Mechanical Ltd.; *L. C. Arnold* and *V. McNiel* on behalf of Sean O’Ryan and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46; no one appeared on behalf of Brady & Seidner Ltd.

DECISION OF THE BOARD; August 5, 1986

1. The Board delivered the following decision orally at its hearing in this matter on July 25, 1986:

These are two complaints before the Board under section 89 of the *Labour Relations Act* (Board File Nos. 0911-86-U and 0998-86-U) and an application for consent to institute a prosecution (Board File No. 0868-86-U). During the course of the hearing yesterday, we consolidated the two complaints under section 89 and amended the style of clause so that the complainants are the Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto, Frank Michelucci,

Derwent Lewis and Jack McCarron. The respondents are all other parties in these two complaints. In making the consolidation order, we noted that the complainants and respondents will both be entitled to claim relief in respect of the other parties to this proceeding. The Board also ruled that the evidence in the consolidated section 89 proceeding would be applied to the application for consent to prosecute which would also be heard by this panel of the Board. In making this ruling, we held that counsel for the respondents in the application for consent to prosecute may raise the objections they wish to make with respect to counsel for the applicant in the consent to prosecute application calling the respondents or their representatives as witnesses in the consolidated section 89 proceeding at such time as they are called as witnesses by counsel for the applicant.

The Board also made a ruling with respect to the production of documents and then adjourned in order to permit counsel to review those documents.

When the hearing resumed into this matter, Mr. Geiger, counsel for certain of the respondents raised a concern about the propriety of our colleague, Mr. Eayrs, continuing to sit as a member of this panel of the Board in respect of this matter. He indicated that the relevant documents he reviewed made several references to Mr. Eayrs and to the Construction Employers Co-ordinating Council of Ontario (C.E.C.C.O.) with respect to co-ordinated bargaining. Mr. Eayrs is the executive director of C.E.C.C.O. Counsel also submitted that Jack McCarron, a complainant in this proceeding, is involved in collective bargaining affairs with Mr. Eayrs through his participation in C.E.C.C.O. Counsel did not at this stage of the proceeding submit that there was a reasonable apprehension of bias in Mr. Eayrs continuing to participate as a Board member, but purported to reserve his right to do so should the evidence that is presented reveal facts that would give rise to such an apprehension. Mr. Geiger expressly stated that neither he nor his clients were suggesting actual bias on the part of Mr. Eayrs, but rather that his role in C.E.C.C.O. and his involvement with Mr. McCarron might raise a reasonable apprehension of bias.

Mr. Arnold, on behalf of certain other respondents, submitted that there was a reasonable apprehension of bias on the grounds expressed by Mr. Geiger. While not imputing any impropriety on the part of Mr. Eayrs, Mr. Arnold submitted that Mr. McCarron's involvement with Mr. Eayrs in C.E.C.C.O.'s affairs raised an apprehension of bias.

Mr. Grossman rejected the submissions of other counsel. Mr. Grossman argued that Mr. Eayrs, a person with many years of experience in the construction industry was in fact a most appropriate member of this panel. He argued that members of the Board are often chosen because of their experience in the industry and in the work place and that such experience will often involve contact with other parties who appear regularly before the Board. Therefore, if Mr. Eayrs could not sit as a member of the panel in this case, it would be inappropriate for him to sit on any case related to the construction industry, a patently absurd result given the construction industry experience and insight that Mr. Eayrs brings to the Board.

Mr. Geiger emphasized that his concern about Eayrs related to nature of the issues in this case, that is co-ordination of bargaining in the construction industry, and stemmed from Mr. Eayrs significant role in that co-ordination through C.E.C.C.O.

C.E.C.C.O. is made up of eighteen of the designated employer bargaining agencies that participate in provincial bargaining pursuant to the province-wide bargaining provisions of the *Labour Relations Act*. One of the members of C.E.C.C.O. is the Mechanical Contractors Association Ontario which bargains through its Mechanical Trades Bargaining Committee.

One of the important functions of C.E.C.C.O. is to co-ordinate collective bargaining in the industrial, commercial and institutional sector of the construction industry. The co-ordination of collective bargaining in that sector naturally arises from section 146(3) of the *Labour Relations Act*, which provides:

"Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978."

Common expiry dates of all provincial agreements is a legislative direction that collective bargaining in the construction industry in respect of the industrial, commercial and institutional sector must take place at about the same time with the natural result that there will be communication and co-ordination of bargaining positions in respect of that sector.

We understand that the Mechanical Contractors Association Toronto and the Mechanical Contractors Association Ontario are related organizations although at this point in the proceeding we are unaware of the nature of that relationship. However, by virtue of the relevant designation order the Mechanical Contractors Association Ontario, through its Mechanical Trades Bargaining Committee, conducts collective bargaining in the industrial, commercial and institutional sector on behalf of the members of the Mechanical Contractors Association Toronto whose employees are represented in collective bargaining by Local 46 in respect of the industrial, commercial and institutional sector of the construction industry.

A principal issue in this case appears to be the nature of the relationships among the Mechanical Contractors Association Ontario, the Mechanical Contractors Association Toronto and the employers who are represented in collective bargaining with Local 46 in the residential sector of the construction industry by the Metropolitan Plumbing and Heating Contractors Association, a division of Mechanical Contractors Association Toronto by virtue of the accreditation order issued by the Board on April 5, 1973.

Mr. Geiger submits that the relationship between the bargaining positions taken by the Mechanical Contractors Association Ontario in industrial, commercial and institutional sector bargaining and the position taken by the accredited employers' organization in bargaining in the residential sector of the construction industry pursuant to the accreditation order is also in issue.

C.E.C.C.O. and therefore Mr. Eayrs is directly involved in co-ordinating

bargaining positions in the industrial, commercial and institutional sector. Mr. McCarron is involved in that co-ordination as a representative of the Mechanical Contractors Association Ontario.

On the basis of the submissions and factual assertions made, we must determine whether our colleague Mr. Eayrs should continue to sit as a member of the Board in this proceeding. That determination requires us to decide whether the circumstances described above give rise to a reasonable apprehension of bias. (See *Jones, Principles of Administrative Law*, 268; and the decision of the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board*, (1976), 68 D.L.R. (3d) 716 at 728.)

In our opinion, the submission that there is a reasonable apprehension of bias based on Mr. Eayrs' professional relationship with Mr. McCarron in respect of collective bargaining is totally without merit. We can do no more than refer to and with respect adopt the following passage from the decision of the Divisional Court in *Marques v. Dylex Ltd.*, (1977), 81 D.L.R. (3d) 544 at 565-67:

"While the test, as broadly stated and as particularized somewhat in the quotations, is in general terms and while the categories of reasonable apprehension of bias cannot really be closed, some assistance as to the content of the principle can, I think, be gleaned from the cases. In this regard, no case has been brought to our attention in which a prior professional association with a party has been held to be a ground of reasonable apprehension of bias nor has any case in which a prior professional relationship with one of the counsel, which has led to this result. The situation is different, of course, if the tribunal member had anything to do with the actual case before him. I refer to the *Committee for Justice and Liberty et al.* case itself in this regard.

With respect to the existence of a prior association in itself, in that case, business association, if I may loosely put it that way, Chief Justice Laskin in *Committee for Justice and Liberty et al.* said, at p.730:

'While I would not see any vice in Mr. Crowe sitting on an application coming from or through the Study Group in relation to a matter in which he was not involved, even though it was decided upon shortly after his dissociation from the Study Group, that is not this case.'

In looking at the cumulative effect of the factors relied upon by counsel for the employer there are certain other factors which have to be weighed in the balance. They are as follows. The vice-chairman had nothing to do with any aspect of the present proceedings, as part of his association with the law firm or otherwise, and neither did the law firm itself during the currency of his association with it. Over a year had elapsed since he had anything to do with the union, or more correctly, one of its predecessors. Almost a year had elapsed since his connection with the law firm terminated.

Further, on a more general plane, the nature and functions of the Board itself have to be regarded. The fact that a Judge in similar circumstances would not, I would think, have heard the case is not determinative. (In saying this I am not expressing an opinion on minimum *legal* standards.) We can take judicial notice, if it is not apparent from the *Labour Relations Act* itself, that members of the Labour Relations Board and in particular the chairmen of panels will have had experience and expertise in the law and labour relations. The Government of Ontario looks to people with such a background in making appointments. Most, if not all of those appointed, are bound to have some prior association with parties coming before the Board. In this connection the remarks of Mr. Justice Hyde in *R. v. Picard et al.*, *Ex p. Int'l Longshoremen's*

Ass'n, Local 375 (1968), 65 D.L.R. (2d) 658 at p. 661, [1968] Que. Q.B. 301, are apposite:

'The only basis for any apprehension of bias submitted by appellant is that Commissioner Picard had been consulted more than a year before his appointment as Commissioner by Aluminium Limited which is a company which controls one of the parties before the Commission, namely, the respondent Saguenay Shipping Ltd....I am quite unable to anticipate a biased approach by Commissioner Picard on the ground raised by appellant. Professional persons are called upon to serve in judicial, *quasi-judicial* and administrative posts in many fields and if Governments were to exclude candidates on such a ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought.'

However, we are not as certain about the correct conclusion to be made with respect to the objection based on Mr. Eayrs' role as Executive Director of C.E.C.C.O. in the co-ordination of bargaining. A significant issue in this case is the propriety of co-ordinated collective bargaining as it affects the bargaining in the residential sector of the construction industry in the geographic area described in the accreditation certificate of April 1973. Although we are not certain at this point, the function and duties of C.E.C.C.O. in co-ordinating collective bargaining in the industrial, commercial and institutional sector may be relevant in assessing the propriety of the bargaining positions taken by the parties to this proceeding. Therefore, it may be that as the evidence unfolds Mr. Eayrs may be closer to the issues in dispute than he is now.

While the facts before us are distinguishable from the facts that were before Chief Justice McRuer in *Regina v. Ontario Labour Relations Board, Ex parte Hall*, (1963), 39 D.L.R. (2d) 113 (the David Archer Case), Mr. Justice McRuer's comments at page 120 require consideration:

"I will assume that the Legislature contemplated that the employees' representatives on the Board would be members of trade unions. I do not think Mr. Archer would have been disqualified in this case merely because he held membership in a trade union affiliated with the Ontario Federation of Labour. The distinction between mere membership and an executive responsibility to carry out declared policies of any body is well demonstrated in *Leeson v. General Council of Medical Education & Registration* (1889), 43 Ch. D. 366. A careful reading of the majority judgments and the minority judgment of Fry, L.J., which was favoured by Davey, L.J., in *Allinson v. General Council of Medical Education & Registration*, [1894] 1 Q.B. 750, demonstrates how fine the line of demarcation can be. A man might well be a member of a trade union and be free to act with respect to matters before the Board affecting another trade union. It is, however, quite a different thing where a member of a board has a dual responsibility, on the one hand to carry out the declared policies of the Ontario Federation of Labour and on the other hand to decide impartially any matters that may be in conflict with those policies. I do not think on any recognized principle of law applicable to judicial or *quasi-judicial* tribunals one who has clearly divided loyalties as in this case can be permitted to act."

The primary role of C.E.C.C.O. is to co-ordinate collective bargaining in the industrial, commercial and institutional sector of the construction industry. Mr. Eayrs as Executive Director of C.E.C.C.O. is charged with that responsibility. Since a significant issue in this case may be the impact of industrial, commercial and institutional sector co-ordinated collective bargaining on the

bargaining that gives rise to this proceeding, Mr. Eayrs, as well as Mr. Wilson and I are seriously concerned about the objection taken by Mr. Arnold and the reservations expressed by Mr. Geiger about Mr. Eayrs continuing to sit as a member of the Board in this matter.

We also note the following comment of the Divisional Court in the *Marques v. Dylex Ltd.* case, *supra*, at page 567:

"Taking all of the foregoing into account, it is my view, that in the circumstances of this case there was not a reasonable apprehension of bias as that term is understood and has been applied. The matter of the prudence of the vice-chairman in sitting in the case is another issue which is not, of course, before us for decision."

While we are not satisfied that in law Mr. Eayrs is disqualified from continuing to sit in this matter on the grounds of reasonable apprehension of bias, our conclusion is not free of doubt. Therefore, we believe that it is prudent in this case for Mr. Eayrs not to continue to sit as a member of this panel of the Board in this proceeding. Accordingly, this panel's decisions in respect of the various procedural issues raised thus far remain in force, but this panel of the Board will not commence hearing any evidence in this proceeding.

2. Counsel for the complainant asked us to set out our oral ruling with respect to the production of documents. The Board's ruling relating to the issue of production of documents referred to in the second paragraph of our oral decision above arises out of paragraph 4 of the Board's decision (differently constituted) in this matter dated July 18, 1986. That paragraph provided:

"4. Counsel for the parties discussed the production of certain documents. All counsel undertook to produce documents to other counsel that may be relevant to these proceedings. The Board also directed all counsel to produce any document upon which they intend to rely at the hearing of this matter. No document will be admitted into evidence at the hearings that has not been produced except with the consent of the Board hearing these matters. The Board directed that the production of documents was to be completed not later than 4:00 p.m., July 22, 1986."

3. Counsel for the complainants and counsel for Local 46 and Sean O'Ryan interpreted the Board's direction as requiring photocopies of the documents to be delivered to the Board and other parties by the time stipulated. Mr. Geiger interpreted the Board's direction in that paragraph as requiring the preparation and delivery of a list of the documents and making the documents available for inspection. Counsel for the complainants submitted that the Board should preclude Mr. Geiger from introducing into evidence the documents he listed because Mr. Geiger, in not providing photocopies of the documents to other counsel, failed to comply with the Board's direction.

4. Mr. Geiger wished to argue that the term "production" should mean what it means in the civil court's rules of procedure. It was not necessary to hear Mr. Geiger's full argument on that point because we did not need to decide whether there had been compliance with the earlier direction. In *Shaw Alemex Industries Limited*, [1984] OLRB Rep. April 659 at 671-72 the Board discussed the strict requirements of a production order made by the Board. Counsel before us interpreted the Board's ruling differently but each interpretation was a reasonable one. Therefore, the Board did not find it appropriate to impose on Mr. Geiger or his clients, assuming without finding that he failed to comply with the direction, the drastic result of preventing the introduction of those documents into evidence for the reasons advanced by counsel for the complainants.

5. The Board directed that the documents listed by Mr. Geiger be made available to other

counsel and that Mr. Geiger provide photocopies of all documents requested by other counsel at the expense of counsel making the request.

6. We also wish to record that Mr. Geiger and Mr. Arnold did not object to producing the documents that are in their clients' possession referred to in the summonses to witness served on their clients.

7. This matter is referred to the Registrar to be relisted for hearing before a panel of the Board comprised of the vice-chairman and employee member of this panel and an employer member of the Board to be determined. The hearing shall continue on September 8, 9, 10, 22, 26, October 22, 24, 27, 30, November 3, 4, 10, 12 and 13, 1986.

0608-86-M Labourers' International Union of North America, Local 247, Applicant, v. M. Sullivan and Son, Respondent

Construction Industry Grievance - Whether provisions of province-wide collective agreement apply to specific area of province - Whether master agreement applies when no local schedule mandatorily applies - Where language in collective agreement permits, geographic jurisdiction assigned to individual locals corresponding to jurisdiction local enjoyed prior to province-wide bargaining - Extrinsic evidence admissible re actual jurisdiction

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *J. A. Ronson* and *D. A. Patterson*.

APPEARANCES: *D. Strang*, *Mike Sullivan* and *Fred Bailey* for the applicant; *Bruce Binning*, *George Johnson* and *James Thomson* for the respondent.

DECISION OF THE BOARD; July 23, 1986

1. This is a referral of a grievance to the Board, pursuant to the provisions of section 124 of the *Labour Relations Act*.

2. The respondent commenced work on an "industrial, commercial and institutional" project in the Bancroft area in late April of this year. The respondent is party to the applicant's province-wide collective agreement covering that sector, and telephoned the applicant's office in Kingston for men. Three members of the applicant were thus referred to the job and hired. The respondent paid these men at the rate specified under the applicable schedule of the collective agreement, but declined to pay travel time in accordance with that schedule. After a week the respondent indicates that the project had to be interrupted (we make no finding in this regard), and the three Union members were laid off. When the project resumed, the respondent staffed the project with non-Union labour.

3. The applicant initially grieved on the basis that the respondent in the week that its members were employed failed to pay travel time, and that the respondent subsequently failed to hire members of the applicant and apply the terms of the collective agreement at all. That grievance was amended to include a claim that the three members of the applicant had been discharged for asserting their right to travel time, i.e., not for "just cause", as required by the terms of the col-

lective agreement. The position of the respondent is that its initial decision to hire men through the applicant's hiring hall in Kingston was a voluntary one, and that the hiring provisions of the collective agreement, and Local 247's schedule to the agreement, are not, by their own terms, applicable to this area of the Province.

4. Section 146 of the *Labour Relations Act* deals specifically with the question of a province-wide agreement for the industrial, commercial and institutional sector of the construction industry. The section stipulates:

(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biannually from the 30th day of April, 1978.

The respondent does not deny that there is thus a requirement that the employer bargaining agency and the employee bargaining agency conclude one collective agreement which covers the entire province. This is supported by the specific recognition sections of the provincial agreement now before us, which provide:

1.01 The E.B.A. recognizes the Union as the sole and exclusive bargaining agent for all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work and all other construction Employees engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, for whom the Union has bargaining rights.

1.02 The Union recognizes the E.B.A. (the several parties are listed on Schedule "C") as the sole and exclusive bargaining agent for all Employers whose Employees are represented by the Union and for whom the Union has bargaining rights who are engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

The respondent accordingly acknowledges that there is no area of the province that falls outside the general framework of the parties' collective agreement. The respondent points out, however, that to say that is not to answer the question which of the various provisions of the agreement apply to a *specific* area of the province.

5. The Board agrees with the respondent in that regard. As is generally the format for the provincial agreements negotiated for the industrial, commercial and institutional sector of the construction industry under the aforesaid provisions of the *Labour Relations Act*, the agreement consists of a "master" portion plus individual schedules setting out terms and conditions which differ for varying parts of the province. If it is possible for the parties to negotiate schedules which vary in their terms for different parts of the province, it must also be possible for the parties to leave parts of the province covered by no schedule. That would leave the master portions of the collective agreement to apply. But even some of those provisions could conceivably be limited by the parties in terms of geographic application; there could, in other words, be areas of the province with respect to which the parties agree, under their province-wide agreement, to leave the employer's discretion largely unfettered. We do not say that this is common, we only say that it is possible.

6. The respondent in its argument places great reliance on Article 1.03 of the master portion of the collective agreement which reads:

The Employer recognizes each Local Union as specified in the attached Schedule "A" to be the administrative party of this collective agreement for work performed within the geographical area and/or jurisdiction of the Local Unions as defined in Schedule "B" attached hereto.

This clause appears to delegate the *administration* of the collective agreement from the employee bargaining agency (the Labourers' International Union of North America and the Ontario Provincial District Council of the International) to the various affiliated Locals in accordance with the geographical area and/or jurisdiction of the respective Local Union "as defined in *Schedule B*". The problem for the applicant Local 247 is that the geographical area or jurisdiction assigned to it in Schedule B is very specific in terms of townships in the County of Hastings, and the townships of the *northern* part of Hastings County, in which the Bancroft area falls, are omitted. The specific provision reads:

Local 247

Area 29 is the Counties of Lennox, Addington, Frontenac and Leeds. Area 30 is Grenville County. Area 12 is Prince Edward County and the Townships of Lake Tudor, Grimsthorpe, Marmora, Madoc, Elzevir, Rawson, Huntingdon, Hungerford, Sydney, Thurlow and Tyendinaga in the County of Hastings.

It is not in dispute that this is an elliptical way of saying that Areas 29, 30 and 12 are the domain of Local 247. This is borne out by the Recognition Article in Local 247's schedule:

ARTICLE 1 - RECOGNITION

1.01 The Employer also recognizes Local 247 as the exclusive administrative party of the Collective Agreement [for the employees] in its employ, working in and out of Zone IV of this schedule. The counties and municipalities of this schedule shall be zoned as follows: Zone IV - Board Area 29 - The Counties of Lennox, Addington, Frontenac and Leeds, Board Area 30 - Grenville County, Board Area 12 - Prince Edward County and the Townships of Lake Tudor, Grimsthorpe, Marmora, Madoc, Elzevir, Rawson, Huntingdon, Hungerford, Sidney, Thurlow, Murray, Trenton and Tyendinaga in the County of Hastings.

Both of these geographic descriptions, however, omit from their specific listing the townships of north Hastings. The irresistible inference from that, therefore, is that those townships are not part of the areas 29, 30 and 12 which form the "geographic area and/or jurisdiction" allotted to Local 247 under the terms of the collective agreement.

7. But the applicants (being both the employer bargaining agency and Local 247) argue that Local 247 has always been recognized as having jurisdiction for Bancroft, and that the insertion of the words "in or out of Zone IV" in the second round of provincial bargaining (the 1980 agreement) must have been intended to correct what it says was an obvious oversight in Schedule B. The applicant 247 asserts that it does in fact have the jurisdiction for Bancroft, on the basis of an allotment of local jurisdiction by the International, and that the words "in and out of Zone IV" were added to its Schedule because Local 247 is the only Local whose *actual* jurisdiction is broader than the description in Schedule B. The applicant points out as well the fact that the respondent itself, when it needed men for Bancroft, recognized the jurisdiction of Local 247 for the area and phoned its office in Kingston.

8. There are a number of problems with this leg of the applicant's argument. The applicant did not purport to have any real knowledge how the words "in and out of Zone IV" came to be inserted in its schedule, and even the reference to "Zone IV" is without explanation. Assuming

that “Zone IV” represents the *full* jurisdiction of Local 247 as defined in Schedule B and Article 1.01 of its own schedule (as it appears from the context to be), it is still not obvious that the use of the words “in and out of” was meant to reflect an inherent jurisdiction of Local 247 extending beyond that definition; the schedule for the Ottawa Local 527, *also* contains those words, and there is no suggestion that the jurisdiction granted by the International to Local 527 *also* exceeds the Local’s jurisdictional scope as defined in Schedule B (Local 527’s schedule makes reference as well to “Zones I, II and III”, suggesting that all of these “zone” designations may date back to multi-area bargaining in place for this area prior to the introduction of provincial bargaining). And, perhaps significantly, Local 527’s jurisdictional area is, like Local 247’s, contiguous with the apparently “open” area of north Hastings.

9. We are not, therefore, compelled to the conclusion that the words “employees working in and out of Zone IV” in Local 247’s Schedule must be read as amending what must be taken to have been a deliberate deletion from the Schedule B description of Local 247’s area of jurisdiction under the collective agreement. And, by the terms of Article 1.03 of the master portion, it is the description in Schedule B which determines the Local’s jurisdiction *for the purpose of administering this collective agreement*, and not an internal assignment of jurisdiction by the International (assuming such were proven), to which reference might have been made, but was not.

10. The most that can be said for the impact of the words “employees working in and out of Zone IV” on the application of Local 247’s Schedule is that the Schedule will, by its terms, apply whenever an employer *does* choose to hire men from Local 247 in Kingston for work in the Bancroft area. This is in fact what the respondent did for the first week of the project. While the respondent, in doing so, maintains that such engagement of Kingston men was voluntary, so that the application of the various terms of Local 247’s schedule was discretionary as well, we must find, by the terms of the Schedule itself, that once the hiring was made, all terms of the Schedule came to apply. The issue of travel time under that schedule must therefore be resolved, for that first week when Kingston members were employed, in favour of the applicant. Subject to the question of an improper discharge, however, we find, by the express terms of the agreement, that Local 247’s Schedule did *not* apply to the hiring of other than Union members from Kingston thereafter.

11. But that is not the end of this complex case. While there may be (and we find there is) an “open” zone where no *Local* schedule can be said to mandatorily apply (i.e. without the employer first making the election to *hire* from that Local), the collective agreement is still a provincial one, and, as noted earlier, the respondent concedes that at least portions of the “master” agreement apply. The question is, which portions, by their terms, do apply (or perhaps more appropriately, which, by their terms, do *not* apply). In particular, do the Union Security and Hiring Hall provisions of the “master” agreement apply?

12. Article 2.01 provides:

The Employer agrees to employ only members in good standing of the Local Union specified in Article 1.03 for work covered by this Agreement.

The “Local Union specified in Article 1.03” could be read simply as the list of all Local Unions, with the address of their business office, set out in Appendix A. But that would not tell an employer which of the 15 Local Unions he is to draw his employees from on a given job. The reference, therefore, must include “the geographical area and/or jurisdiction” set out in Schedule B. The applicant is thus back to its problem, under Article 2.01, that the northern part of Hastings county, where the instant job is situated, is omitted from Schedule B altogether.

13. Article 3.01 provides:

"The following provision will apply to the hiring of all Employees except as specifically provided for elsewhere in the Master Portion, Trade Appendices and Local Schedules."

(a) The Employer agrees to call the Local Union by 1:00 p.m. for its needed supply of men for the following day. All Employees hired through the Union shall present to the Employer a referral slip from the Union prior to commencing employment. It is understood that if the Local Union having jurisdiction over the work is unable to provide the required men within 24 hours the Employer is free to hire such labour as is available, but such labour shall acquire a referral slip, prior to commencing work on the second day after hiring, and as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

The Local Unions shall be allowed forty-eight (48) hours to supply men to jobs beyond thirty (30) road miles from the point of origin as defined in Schedule "B" hereto.

(b) The Employer shall have the right to name hire one foreman per project, providing such foreman is a member in good standing of the Local Union having jurisdiction over the area and the employee is registered on the Local Union unemployment list.

Once again, the reference is to "the Local Union having the jurisdiction over the work". This, once again, could be read as meaning "as set out in Article 1.03". That would mean as described in Schedule B, and that, for Local 247, would omit the northern half of Hastings again. The applicant argues that the paragraph:

The Local Unions shall be allowed forty-eight (48) hours to supply men to jobs beyond thirty (30) road miles from the point of origin as defined in Schedule "B" hereto.

demonstrates that Local 247 is intended to have a jurisdiction beyond the area described in Schedule "B". But if "point of origin" is indeed the whole geographic area described in Schedule "B" (which appears unlikely), the paragraph would still apply to every Local in the province, giving them 48 hours to supply men in *another* Local's area, and the paragraph would make no sense. (It appears more likely that the reference in this paragraph was meant to be to the business office of each Local set out in Appendix A.)

14. We do, however, recognize that as a general rule in provincial agreements the geographic jurisdiction assigned to individual Locals corresponds to that jurisdiction which each Local enjoyed prior to province-wide bargaining. We are therefore prepared to interpret the collective agreement with that principle in mind, *where the language permits*. We are therefore prepared to interpret the words "the Local Union having jurisdiction over the work" as at least ambiguous, and not necessarily meaning the same as the language in Article 1.03 referring specifically to Schedule B. On that basis we find the extrinsic evidence proffered by Local 247 with respect to its "actual" jurisdiction to be at least admissible. In the face of the detail with which the Local's jurisdiction is spelled out for the administration of the collective agreement under Schedule B, however, and the aforesaid practice of a Local Union's geographic jurisdiction under the collective agreement generally corresponding to its "actual" jurisdiction granted by the International, we agree with the respondent that cogent evidence of jurisdiction having been granted by the International beyond that contained in Schedule B is required.

15. The applicant has simply not been able to produce such evidence in these proceedings. Apparently, no charter was issued to Local 247 spelling out the precise terms of its geographic jurisdiction. Rather, a series of disputes amongst various Labourers Locals were resolved in 1970 by way of a decision of the International President, Peter Foscoe. That decision was contained in a letter dated May 28, 1970, filed with the Board, but the letter itself contains no description as to geographic limitations; instead the letter refers to an attached map, with the boundaries of each Local's jurisdiction marked on it. The applicant was not able to produce that original map before us. What *was* produced was a map recently prepared by someone at the International office, which

Local 247's Business Manager, according to his testimony, advised was a current copy of the original. In addition, a business representative of the International testified as to the general practice of copies being made of the original jurisdictional map. No evidence linking the specific map filed to the original map was adduced, or exposed to cross-examination. It is our view that better evidence than what was adduced is required to satisfy the Board that the recently-prepared copy of the map accurately reflects the jurisdictions set out in the original map, in the face of the clear language of Schedule B of the collective agreement, upon which the respondent has relied. Compare *R. v. Barber*, [1968] 2 O.R. 245 (C.A.); *Re Givvin*, [1973] 1 O.R. (2d) 421 (Div. Ct.). On the evidence before us, we are not prepared to find that Local 247 has a jurisdiction under the collective agreement other than that carefully spelled out in Schedule B. It follows from that that the area of north Hastings is an "open" area under the collective agreement to which none of the Locals' hiring halls mandatorily apply.

16. As noted, however, the respondent did voluntarily avail itself of Local 247 members through the Kingston office at the outset of the project. There is nothing in the language of Article 5 (Management's Rights) of the master portion of the agreement to suggest that it (and its requirement of just cause for discharge) is inapplicable to any area of the province. Article 5, therefore, as well as Local 247's Schedule, would apply once the Local 247 members were hired. It is therefore necessary to inquire into the applicant's allegation that its three members were discharged rather than being laid off for lack of work. No evidence in that regard has been heard by this panel, and, as the project is ongoing, the Registrar is directed to schedule this matter for continuation of hearing within two months of the date hereof, in consultation with the parties, but without regard to the composition of the panel.

17. The respondent is directed to compensate forthwith the three members of Local 247 for any damages suffered as a result of the failure of the respondent to apply Local 247's full Schedule to the week during which the three members were employed. The quantum of such damages shall be determined by the panel hearing the "discharge" question in the event the parties are unable to agree.

18. The matter is referred to the Registrar.

0414-85-R Union of Bank Employees (Ontario), Local 2104, Canadian Labour Congress, Applicant, v. **National Trust**, Respondent, v. Group of Employees, Objectors

Membership Evidence - Allegation of non-pay dismissed where employee intended to pay back loan - Initial solicitation procedure involving drop-off of blank membership cards to be filled and mailed in by employees - First certification application withdrawn but refiled on same day - Fresh cards signed and collected by organizers - Whether membership evidence accepted as regular

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *D. H. Blair* and *S. O'Flynn*.

APPEARANCES: *Michael Mitchell* and *Larry Bishop* for the applicant; *Brian Burkett* and *Sharon Scott* for the respondent; *Jenny Kokkas* and *Cindy Dobbin* for the objectors.

DECISION OF THE BOARD; August 27, 1986

1. This is the continuation of an application for certification, in which the Board convened a hearing to inquire into:

- (a) an allegation of “non-pay”; and
- (b) the extent of the applicant’s use of a solicitation procedure which involved the “drop-off” of blank membership cards to be completed and mailed in by employees.

2. With respect to the “non-pay”, the Board was advised by a letter from an employee of the respondent, Ms. Cindy Dobbin, that she did not pay a dollar on her own behalf when signing an application for membership in the applicant trade union. After carrying out its normal preliminary investigation, the Board followed its practice of conducting a “Form 9” inquiry into the allegation: i.e. it summoned for examination by the Board and the parties to the application the employee Ms. Dobbin, the collector, Mr. Larry Bishop, and the Form 9 declarant, who in this case also happened to be Mr. Bishop. The Board at the hearing received the evidence of Ms. Dobbin and Mr. Bishop, together with that of one employee in attendance at the card transaction, and summoned by the applicant union to testify.

3. According to the account of all 3 witnesses, Ms. Dobbin had attended at the office of the applicant with several other employees in order to obtain answers to some questions which the employees, and Ms. Dobbin in particular, had had. Ms. Dobbin and the other employees had lengthy discussions with Mr. Bishop, one of two staff representatives involved in co-ordinating this campaign. After one particular exchange, Ms. Dobbin indicated that she was ready to sign a card. Mr. Bishop then left the room to get one. At this point Ms. Dobbin realized or was advised that she would have to pay two dollars (the initiation fee used by the applicant), and went into her purse to look for it. When Ms. Dobbin discovered that she did not have that money with her, another employee, Leslie Merriman, offered to lend it to her. Ms. Dobbin testified that she and Ms. Merriman were friends, and that it was common to lend money to one another in that manner. Ms. Dobbin added that in such circumstances one would normally pay the other back, but sometimes one would buy the other cigarettes in return instead, or sometimes one would just forget. According to Ms. Dobbin’s version of events that day, she accepted the two dollars offered by Ms. Merriman, and gave it to Mr. Bishop when she signed her card. Ms. Dobbin conceded that Mr. Bishop might still have been out of the room while the transaction between herself and Ms. Merriman took place. Mr. Bishop testified that he was *not* present when any such discussion took place, and that on his return Ms. Dobbin simply handed him the two dollars.

4. We have no reason to disbelieve the evidence of Mr. Bishop, and his absence from the room during the loan transaction is consistent with the account of events by all witnesses. Mr. Bishop would accordingly have no reason to suspect that Ms. Dobbin was not paying him with two dollars that she had had in her possession, and the evidence points to no omission on Mr. Bishop’s part either as a collector or as the Form 9 declarant. If there is a problem with the payment aspect of Ms. Dobbin’s card, therefore, it is a problem, on these particular facts, confined to that card alone.

5. The respondent correctly points out that the question whether the “payment” by Ms. Dobbin is defective or not depends on the application of the test articulated by the Board, for example, in *Laidlaw Wire*, [1985] OLRB Rep. Oct. 1479, at 1487:

Was it a legitimate loan which the borrower sincerely *intended* to repay to the lender?

[emphasis added]

Or, as the Board put it more simply in *Shaw Festival Theatre Foundation*, [1983] OLRB Rep. Sept. 1579, was it a *bona fide* loan? See also *Skene Cartage Company*, [1966] OLRB Rep. April 30.

6. Ms. Dobbin has appeared at the Board hearings as an “objecting” employee throughout the proceedings, and complained to the Board about her “non-pay” in a letter which leaves no doubt of her lack of sympathy for the applicant in the present certification effort. Nevertheless, she gave her evidence before the Board in a straightforward and candid way, and we are prepared to deal with this issue simply on the basis of the testimony which Ms. Dobbin has given. That testimony leaves no doubt that, in the words of *Laidlaw Wire*, *supra*, what occurred between herself and Ms. Merriman was a legitimate loan which Ms. Dobbin sincerely intended to repay. The crucial time is the time of the advancing of the funds, and the critical question, from the point of view of the financial commitment sought by the Board, is what was in the mind of the *borrower*. Ms. Dobbin, after explaining that Ms. Merriman and herself *usually* paid each other back in such transactions, was specifically asked by Mr. Mitchell on cross-examination:

Q. “But you didn’t borrow it *not* intending to give it back ...”

A. “Correct”.

And then further:

Q. “You’re not the kind of person who borrows without intending to repay ...”

A. “No.”

And finally, in answer to the question why Ms. Dobbin did *not* reimburse Ms. Merriman (who has left the company), Ms. Dobbin stated:

“I haven’t seen her since. If she came back, I’d pay it.”

By her own evidence, therefore, Ms. Dobbin unequivocally meets the Board’s test for financial commitment, and the allegation of a “non-pay” is dismissed.

7. That leaves the question of the “drop-offs”. This was a matter initially dealt with by the Board in its decision of November 22, 1985. As the Board noted in that decision, the respondent had drawn to its attention the fact that the applicant at least in March of 1985 had resorted to the practice of dropping blank membership cards off at branches of the respondent in Metro, with instructions to employees to complete and mail them in. If nothing else, such a practice is clearly inconsistent with the Board’s long-established practice of requiring that, where an application is made in the name of a Local, the Local is clearly identified on each membership card at the time that the card is signed. See *Beaver Foundation Ltd.*, [1967] OLRB Rep. Oct. 652; *MacDonalds Consolidated Limited*, [1969] OLRB Rep. Aug. 634; *Bernardin of Canada Limited*, [1975] OLRB Rep. Oct. 737; *Canada Valve Limited*, [1980] OLRB Rep. Dec. 1727; *The Clorox Company of Canada*, [1980] OLRB Rep. Feb. 184. Here the cards used were printed in a form which stated that they related to “____ Local of the Canadian Labour Congress”, so that the Local number itself had to be filled in by hand.

8. The applicant’s initial campaign was conducted from January to April, 1985, and an application for certification was filed on April 26, 1985. The respondent by way of Reply raised its point about the use of “drop-off” cards, and at a meeting with a Board officer on May 17th, prior to appearing at the hearing set for that date, the applicant withdrew its application. The present application was then filed with the Board on the same day. Once again the respondent raised its concern about the earlier “dropped-off” cards. It might be noted here that in the Board’s view the

problem raised by the respondent is primarily with the "mail-in" aspect of the process, on the assumption that no organizer is present to fill in the Local number before the card is returned by the employee. The applicant argued (repeatedly) that in view of the fact that all of the cards on the second application bore the Local's designation when filed, and that the Form 9 disclosed no reliance on mailed-in cards, the Board ought to accept the Form 9 at face value, and inquire no further. In light, however, of the proximity of the 2 campaigns, the equivocal admission by the applicant in another stage of the proceedings that its campaign had run from "January to June" and had included, *inter alia*, the "drop-off" of blank cards, and in particular the fact that the applicant had created the present problem by putting into circulation cards in a form clearly insensitive to the Board's known standards of membership evidence, the Board found it appropriate to call upon the applicant to satisfy it by *viva voce* evidence that it had taken adequate steps to insulate its second application from the practice adopted with respect to the first.

9. That evidence was given by Mr. Bishop, again, one of the two staff organizers responsible for co-ordinating the National Trust campaign, and the individual responsible for collecting all of the cards from the "collectors", and executing the Board's Form 9 declaration. Mr. Bishop testified that the original drop-offs began with a leafletting of a conference held by National Trust for its employees at the Royal York Hotel in late March of 1985. Hotel management interfered with that activity, however, and the 'packages' of pamphlets, cards and instructions were divided up and later that week were delivered directly to employees as they worked in the various branches of National Trust in Metropolitan Toronto. That activity prompted a letter from National Trust to the applicant asking that they immediately cease such approaches on the employees' work time, and the applicant did so. No further "drop-offs" or "mail-ins" occurred in either campaign thereafter.

10. When the applicant arrived with legal counsel at the Board for the hearing of the first application on May 17th, the application was, as noted, withdrawn (in fact it was ultimately dismissed by the Board, in view of the stage at which the request for withdrawal was made). Mr. Bishop and the other staff organizer, Mr. Devine, then met with their legal counsel and employee organizers from the various branches affected by the application (it is possible that one branch was not represented), at which time the organizers were "raked over the coals" by counsel for their handling of the first application. The group then sat and handwrote, on enough cards to cover an entire fresh campaign, the heading:

"Union of Bank Employees,

Local 2104 (Ontario) - CLC"

After that was done, each of the organizers took enough cards to re-sign those who had signed in the first campaign. Mr. Bishop testified that when he subsequently went round to collect all the cards for the second application, he noted the handwritten heading at the top of each card, and, having had, as he said, to pull an application the first time around, asked each collector if these were the same cards prepared at the May 17th meeting, and whether any difficulty had been encountered in obtaining the two dollars a second time. To the extent that there were any irregularities so discovered, these are said to be disclosed on the schedule of "irregularities", of which there are several, appended to Mr. Bishop's Form 9 declaration.

11. The Board begins by noting that there is a possibility in every organizing campaign that an employee could be given a blank membership card, could fill it in without the Local number on it, and return it to the Union by mail or otherwise, without that fact ever coming to the Board's attention. The Board does not, notwithstanding that, ordinarily require evidence to be adduced which would satisfy it that that could not possibly have taken place. The question is, is there any-

thing before the Board in this second application to now suggest that there is more of a risk of that having happened here than in any other case? We find, on the contrary, that there is *less* of a risk than normal that such has occurred. For the reasons given earlier in the decision, the Board felt it appropriate in the special circumstances of this case to call upon the applicant to explain by *viva voce* evidence the manner in which its card solicitation was carried out. That evidence disclosed that there were no further “drop-offs” of blank cards during the period of the second campaign, and more importantly, that there was no invitation to employees to *mail in* cards. A number of “objecting” employees were in attendance for the examination of Mr. Bishop on this issue, and his evidence was not contradicted in any way. The applicant, very much sensitive to the issue of blank cards after the withdrawal of its initial application, obviously took a great deal of care to ensure that the possibility of that defect was avoided in the second application. All of the cards submitted with the second application bear the handwritten heading of the Local, as Mr. Bishop described. By contrast, none of the 6 cards transferred from the prior application bear that heading (although each has the number of the Local filled in in the blank provided for that purpose). There is, in short, nothing before the Board whatever to contradict the evidence of Mr. Bishop, and to suggest that the applicant has failed to take reasonable steps to safeguard this application from the defect which arose in its predecessor.

12. Being accordingly satisfied by the evidence which the applicant was called upon to adduce, the Board finds no ground to proceed any further with an inquiry into the applicant's membership evidence, and accepts that evidence as regular. Of the 6 cards transferred from the first application, the applicant, having conducted its own inquiries for the purpose of the Form 9 declaration, relies upon only 2 of them. One is Ms. Dobbin's, and the Board, as it happens, has now heard enough direct evidence to be satisfied with respect to her card (the potential effect of the “petitions” against the applicant, to which Ms. Dobbin is obviously one of the signatories, has yet to be ascertained). The other card is dated January 26, 1985, and does not on its face raise a problem with the drop-off/mail-in campaign which began in late March. The Board accordingly finds no reason not to accept as regular either of the transferred cards.

13. In the event that this application was to proceed further, the parties agreed to present oral argument with respect to the officer's report on September 15, 1986, to a panel of the Board however constituted, so that the Board could proceed to determine the appropriate exclusions from the branch units, and thus the numerical relevance of the employee statements in opposition. The parties undertook as well to confer as quickly as possible and, with the assistance of a Board officer, finalize the lists of employees applicable to each branch (subject to the Board's ultimate determination of the exclusions). The Board now confirms all of those arrangements in light of the present decision.

14. The matter is referred to the Registrar.

3228-85-R Roger Simpson, Applicant, v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 880, Respondent, v. Omstead Foods Limited, Intervener

Settlement - Termination - Two agreements signed by applicant, union and employer requiring representation vote and extending collective agreement - Whether applicant permitted to resile from agreements - Whether company exerted undue pressure - Board refusing to void or not give effect to agreements - Representation vote ordered - Whether costs awarded

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *W. H. Wightman* and *C. A. Ballentine*.

APPEARANCES: *Robin B. Cumine* and *Roger Simpson* for the applicant; *Frank Luce*, *Wilfred May* and *Al Le Fort* for the respondent; *Leonard P. Kavanaugh, Q.C.*, *Gerald Omstead* and *Tom Omstead* for the intervener.

DECISION OF THE BOARD; August 14, 1986

1. The name of the respondent is amended to read: "Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 880".
2. This is an application under section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent for the bargaining unit employees of the intervener.
3. By two separate agreements in writing dated April 29, 1985 the parties purported to resolve this matter subject to the Board's approval. The shorter of the two agreements (the "first agreement") relates solely to the termination application and was mailed to the Board immediately after being executed by the parties. In the course of these proceedings, a photocopy of the first agreement was marked as Exhibit 4 and another copy containing original signatures was marked as Exhibit 4A. Though the applicant stated in his evidence that he did not recall signing this document, it is clear that he did so. Indeed, he admitted that it contains his signature, which signature is the same as that on Exhibit 5 which he does recall signing. The complete text of the first agreement is as follows:

AGREEMENT dated the 29th day of April, 1986;

Re: O.L.R.B. File No. 3228-85-R

1. The Respondent and the Intervener hereby recognize that the within application is timely and that not less than 45% of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the Respondent.
2. The Applicant, the Respondent and the Intervener hereby request the Ontario Labour Relations Board to direct a representation vote in this matter pursuant to Section 57(3) of the *Labour Relations Act*.
3. The Applicant, the Respondent and the Intervener hereby further request the Ontario Labour Relations Board to hold the said representation vote not earlier than the week of November 17, 1986.
4. The provisions of paragraph 1 hereof are wholly conditional upon the Ontario Labour Relations Board holding the said representation vote not earlier than the week of November 17, 1986.

IN WITNESS WHEREOF the Applicant, the Respondent and the Intervener have executed this Agreement this 29th day of April 1986.

4. The first agreement was in fact only part of the "settlement" agreement between the parties. Another, lengthier document (the "second agreement"), marked as Exhibit 5 in these proceedings, contains the whole of the settlement. In fact the language of the first agreement in effect constitutes the putting into effect of paragraphs 11, 12, 13 and 14 of the second agreement. The text of this second agreement (without appendices) is as follows:

WHEREAS the Union is the bargaining agent of certain employees of the Company;

AND WHEREAS the Company and the Union were parties to a Collective Agreement (the "Collective Agreement") which had a term of operation, as specified therein, from and including the 12th day of April, 1984, to and including the 11th day of April, 1986;

AND WHEREAS a copy of the Collective Agreement is attached hereto as Exhibit I;

AND WHEREAS the Applicant did, on the 25th day of March, 1986, make Application For Declaration Terminating Bargaining Rights (the "Application");

AND WHEREAS the Application is currently pending before the Ontario Labour Relations Board;

WITNESSETH THEREFORE that in consideration of the execution of this Agreement and the mutual covenants herein, the Company, the Union and the Applicant hereby agree as follows:

1. The Collective Agreement is extended until the 31st day of December, 1986, without any alteration or amendment whatsoever, save and except Article 25 thereof and save and except as specifically provided in this Agreement.
2. Article 15(a)(i) is amended as provided in Exhibit III attached hereto.
3. Article 15(a)(ii) is amended as provided in Exhibit III attached hereto.
4. Article 15(c) is amended as provided in Exhibit IV attached hereto.
5. Article 17(a) is amended as provided in Exhibit V attached hereto.
6. The wage rates delineated in Exhibits II, III, IV and V attached hereto include eighteen cents (18¢) Cost of Living Allowance which was accrued pursuant to Article 21 of the Collective Agreement and which has been folded into the wage rates.
7. Article 21 is amended as provided in Exhibit VI. There will be no Cost of Living Allowance paid during the extension of the Collective Agreement except as provided in Exhibit VI.
8. Article 19(f) is amended, effective June 1, 1986, to provide coverage on the basis of the 1983 O.D.A. Schedule of Fees.
9. The Company will provide an office within Plant 1 for the use of the Union's Business Agent and/or elected officers of the Union and will equip same with a telephone.
10. There will be no strike or lock-out during the extension of the Collective Agreement.
11. The Company and the Union recognize that the Application is timely and that not less than 45% of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the Union.
12. The Company, the Union and the Applicant agree to request the Ontario Labour

Relations Board to direct a representation vote pursuant to Section 57(3) of the *Labour Relations Act*.

13. The Company, the Union and the Applicant further agree to request the Ontario Labour Relations Board to hold the said representation vote not earlier than the week of November 17, 1986.
14. Paragraphs 11, 12 and 13 hereof are wholly conditional upon the Ontario Labour Relations Board holding the said representation vote not earlier than the week of November 17, 1986.

IN WITNESS WHEREOF the Company, the Union and the Applicant have executed this Agreement this 29th day of April, 1986.

5. The applicant, Mr. Simpson, now asks the Board to declare that the first agreement, and that part of the second agreement that relates directly to it, is void or of no effect and asks that he be allowed to proceed with his termination application in the normal manner. In the alternative, he requests a declaration that both agreements are either void or will not be given effect to in their entirety and seeks leave to proceed with the termination application. The sole issue before the Board at this time, is the validity of the two agreements and, collaterally whether or not the Board will give effect thereto. The question is not whether or not the agreements were entered into but whether the circumstances under which they were signed were such that they should not be given effect to.

6. In response to a request by the solicitor for the respondent ("the Teamsters"), the applicant ("Simpson") provided particulars in support of his request that the Board set aside or at least not pay heed to the agreements as far as these impact on the termination application. As well as alleging a factual basis for this request, Simpson alleges that the agreement was executed as a direct result of the intervener (the "Company") acting in violation of sections 64, 66 and 70 of the *Labour Relations Act*. It is noteworthy that there are no allegations of misconduct against the Teamsters. Nor are there any allegations of collusion between the Company and the Teamsters. Indeed, counsel for the applicant stated that he was not aware of any such impropriety.

7. The hearing into this matter lasted three days. Simpson called six witnesses, the Teamsters called none and the Company called two. As a result of there being some dispute between the parties as to the material facts, the Board has found it necessary to assess the credibility of the witnesses in making its findings of fact. In doing so, the Board has considered the witnesses' recollection of the events about which they were testifying (including the clarity, consistency and firmness of their recollections), their ability to resist the influence of self-interest in giving their evidence, the plausibility of their version of the events, and their general demeanour as witnesses. Having regard to all of these factors, the Board finds it can give no weight to the evidence of Rolando Cabral whose evidence, both in terms of the manner in which it was given, and its plausibility, we find untrustworthy. We therefore discount it in its entirety. In addition, where the evidence of Simpson, Betsy Cabral, and Tina Friesen conflicts with that given by Bradley Robitaille, Johannes Blokker and Terry Stevenson, we prefer that of the latter three. We note also that Joe Raffoul and Joe Morteniano, named in the particulars filed by Simpson as being part of the "group" supporting the application were present but did not give evidence. Counsel for Simpson indicated that he would make these two gentlemen available for cross-examination. They did not in fact give evidence and counsel for Simpson invites us to draw an inference in favour of the applicant based on their presence and his offer. Under the circumstances, the only inference that we are able to draw is that the evidence of Messrs. Raffoul and Morteniano would have been of no more assistance to the applicant than that of the other witnesses called on his behalf. It is necessary to note that Mr. Robitaille, who was called to the witness stand by the Company was, at all times material to the

issue before the Board, the solicitor for Simpson in the termination application. He testified under subpoena and while giving his evidence was represented by counsel, Mr. George W. King. This was appropriate under the circumstances and having regard to potential difficulties with the solicitor/client privilege that existed between Mr. Robitaille and Simpson. On agreement of the parties, the procedure adopted by the Board was that the examination of Mr. Robitaille (who gave evidence after Simpson) was to proceed as that of any other witness and if Simpson objected through his counsel (the privilege after all being his), that the answer to the question was subject to the solicitor/client privilege, the Board would deal with the objection at that time. As it turned out no objection was made to any questions asked of or answers given by Mr. Robitaille. Consequently, the applicant has waived any privilege that may have attached to any of the evidence given by Mr. Robitaille.

8. The facts relating to this matter are as follows. As a result of voluntary recognition by the Company, the Teamsters have represented bargaining unit employees of the respondent in its operations in Wheatley, Ontario, a town with a population of close to 3,000 and which is some fifteen miles east of Leamington, Ontario, since 1956. It is clear that the Teamsters is the only lawful bargaining agent for these bargaining unit employees of Omstead Foods and that that union will continue to be so unless and until the Board declares that it is no longer the case.

9. The Company operates two plants in Wheatley. It is a seasonal operation with the bulk of its production carried on between mid June and mid December of each year and having, during peak production periods, between six and seven hundred employees. As such, it is the largest employer in the area.

10. Plant No. 1 (as it was referred to in the evidence) processes fish and performs a cook room function. Approximately 350 bargaining unit employees work there. Plant No. 2 processes vegetables and has 80 to 90 bargaining unit employees and 200 to 250 non-bargaining unit employees. The Company operates by processing five to six million dollars worth of fish and vegetables that are brought to it by fishermen and farmers. In April of each year the Company enters into contracts with farmers pursuant to which it agrees to purchase vegetables from them for processing. The Board heard some evidence of how this is done and that there is a practical deadline for letting these contracts at the end of April of each year. This is established by the farmers' need to know where they stand so that they can begin their planting by a crop insurance deadline that falls at the end of April. The Board also heard that as a result of the effect of a strike in 1975 on the Company's operations, the Company adopted a policy that it would not let contracts to the farmers unless there was a collective agreement (which would guarantee no strike during the production period) was in place. This policy was well known to the Teamsters and, we find, to the applicant and his group. Indeed it seems evident from the publicity occasioned by the possibility that contracts would not be let in April of 1986 that this policy was well known throughout the community.

11. The Teamsters and the Company were parties to a collective agreement which had a term of April 12, 1984 to April 11, 1986. As has apparently been the practice between the parties, they began to bargain for a new collective agreement in early 1986, well before the said collective agreement was due to expire. Negotiations continued through early 1986 and on March 24, 1986 the Company presented the negotiating committee of the Teamsters with its "final offer". The Teamsters began preparations to present the offer to the bargaining unit employees for a ratification vote, though without any recommendation that it be accepted.

12. In the meantime Simpson had retained a solicitor, Mr. Robitaille, and instructed him to prepare and deliver the within application for declaration terminating bargaining rights which is dated March 25, 1986.

13. The applicant, whose full name is Murray Roger Simpson, has been employed by the Company for some fourteen years. He is a member of the bargaining unit represented by the Teamsters. Although he says that he has always been opposed to the Teamsters he was a Union steward for approximately four years, apparently for the same period of time as he was a member, until he was removed from that position by the Teamsters in May, 1986. Though the reasons for the removal were not stated, they will become obvious.

14. Though Simpson is the named applicant, he is only one of a group of eight (now former) stewards (hereinafter the "stewards") who have organized the termination application and served as its focal point. Indeed, even this group soon came to be no more than a front for what is now and has been for some time the real moving force behind this termination application. There is no doubt, however, that Simpson has been a key figure throughout. All this was common knowledge among the employees, subsequently to the Company, and subsequently still, to the Teamsters. The eight stewards consist of Simpson and the other individuals who either gave evidence on his behalf or who were available to do so. Of this group of stewards, Simpson, Betsy Cabral and Terry Stevenson were members of the Teamsters' negotiating committee during the 1986 negotiations. All eight are long-term employees of the Company.

15. The ratification vote, scheduled for April 13, 1986 was never held. Apparently as a result of being given notice of the termination application (either by the Board or otherwise), the Teamsters cancelled the vote. Although it is not entirely clear why, the Teamsters felt that it would be "unfair" to proceed with the vote until the outcome of the "decertification" was known (see Exhibit 7). This raised the possibility that there would be no collective agreement for the 1986 production season. Matters took their course and the Company and Teamsters were in a legal strike/lockout position by April 16, 1986.

16. As a result of the importance of the Company's operations to the economy of the surrounding community, the possibility that there would be no collective agreement and therefore no contract to the farmers generated a great deal of interest and publicity in the area. The Company received numerous enquiries from farmers and then from one Mr. Caldwell, the member of parliament for that riding who had himself been approached by a number of his constituents with respect to the matter. At Mr. Caldwell's request a meeting was held at the Company's office on April 18, 1986.

17. Present at that meeting were Mr. Caldwell M.P., Gerald Omstead, Tom Omstead, B. Richman and Armondo Dorego who represented the Company, and Roger Simpson and Betsy Cabral (both still stewards at the time) who were thought by the Company to be spearheading the termination application. The Teamsters were not represented except nominally through the stewards.

18. In the course of this meeting it was suggested that the parties try to structure an interim agreement in order to permit the Company to let its contracts to the farmers and get its production in for 1986. Mr. Simpson indicated in his evidence that he did not have any difficulty with this suggestion so long as the interim agreement lasted for "one full year"; that is, until April, 1987. He indicated that he said that he would instruct his solicitor to make arrangements to discuss the matter. In her evidence Betsy Cabral emphasized that "... all we wanted to do is decertify Teamsters and if we can do that and still operate the Company we will". She also said that they wanted to talk to their lawyer and to the other stewards. It is noteworthy that there was no mention at this time of talking to other employees. On its face, it would seem that this evidence indicates that the applicant was amenable to the suggestion of an interim agreement. However, this agreement must be

viewed, says the applicant, in the light of other circumstances and what he alleges is the improper conduct of the Company.

19. On April 16, 1986, a Company notice of the same date (Exhibit 1), was posted in locations throughout the plants and indicates on its face that it was delivered in some manner to all employees. The Board finds it appropriate and useful to set this notice out in its entirety:

DATE	April 16, 1986	SUBJECT	Vegetable Division Future
FROM	John E. Omstead Assistant General Manager, Vegetable Division		
TO	Gerald E. Omstead, Employee Relations Manager & Vice President		

- (1) Omstead will not plant crops nor commit vegetable tonnage to its growers, without a signed labour agreement between Omstead Foods Ltd., and its employees.
- (2) A change in Unions (although not opposed by Omstead) will take weeks to finalize. (too late)
- (3) Omstead's large vegetable customer's (ie; Heinz, Campbell's, Canada and U.S.A., and more) need to know *NOW*, if we will be able to supply them this year.
- (4) Omstead *cannot* say yes to its customers without a signed contract.
- (5) By Friday, April 25/86, Omstead will have to say *No* to our customers. Results of this are simple; no planting; no production, no jobs! (no jobs from now to July/87)
- (6) The offer Omstead has made is fair, lets work together! Do we plant?

(signed) "John O"

cc: ALL OLMSTEAD EMPLOYEES

20. The following day a Company notice dated April 17, 1986 was also posted at locations throughout the plants (Exhibit 2). It simply states:

To date Olmstead Foods Ltd. has lost 300 acres of peas.

21. It was the evidence of the applicant and that of the witnesses called on his behalf that these notices were construed both by themselves, and by other employees, to be threats that if they did not agree to what the Company wanted they would be responsible for putting hundreds of people out of work and that the Company wanted the termination application withdrawn. In addition, it is alleged that at the meeting of April 18, 1986, Gerald Omstead threatened that the Company would sue or fire (or both) the stewards involved in the "decertification".

22. The Board does not accept the assertion that Exhibits 1 and 2 were understood by the applicant or the stewards to be threats within the meaning of the *Labour Relations Act*. On the evidence there was nothing in Exhibit 1 or Exhibit 2 that was either new or surprising to Simpson or anyone else. The statements in Exhibit 1 set out information that was common knowledge among the employees and in the community. It was suggested that point 2 of Exhibit 1 constitutes a demand that the termination application be withdrawn. With respect, we cannot agree. There is no credible evidence that the Company either suggested or even wanted the application withdrawn.

Rather, the evidence is consistent with the Company's desire to protect what are admitted to be its legitimate interests and concerns.

23. Further, the evidence of the applicant witnesses with respect to what other employees might have indicated to them is clearly hearsay. It may be relevant and admissible to help establish the state of mind of the applicant and the stewards, but given our assessment of the credibility of these witnesses, we attach no weight to this evidence. In addition, where there is a conflict, we prefer the evidence of Mr. Omstead with respect to what transpired at the meeting of April 18, 1986. In that regard, the Board finds that there were no threats to fire the stewards. The Board also finds that there was no direct threat to sue the stewards although Mr. Omstead did indicate that the Company intended to investigate that possibility. In addition, the Board accepts Mr. Robitaille's evidence that he does not recall being asked for his opinion of either the propriety or the viability of such threats and that if they were raised it was more in passing than as a matter of significant concern. We are prepared to conclude that the matter was raised only in the manner recollected by Mr. Robitaille. We are bolstered in our conclusion by the evidence of Mr. Blokker who we did find to be a credible witness. It was his evidence that there was nothing discussed about such threats in his presence with Mr. Robitaille and that he was present throughout the April 29, 1986 meeting to which we will come shortly.

24. It is also appropriate to comment upon a situation involving one of the stewards, Rolando Cabral. It was alleged that a meeting of April 18, 1986, the Company, through Gerald Omstead, threatened to fire Mr. Cabral or any other steward involved in the termination proceedings. No discipline was in fact imposed. We find that the Company merely indicated that it was no longer sufficient for an employee to have only his or her foreman's permission to be absent from a regularly scheduled shift. It is true that this arose in the context of the situation where Mr. Cabral having been given permission to be absent from his shift by his foreman and had attended at the union hall of the United Food and Commercial Workers International Union, Local 459 (hereinafter "UFCW") in Leamington where he was telephoned by Mr. Omstead who had been given information that he was there. It was suggested that there are many Board decisions that have found this kind of conduct to be a violation of the *Labour Relations Act*. Although that submission was made we were not referred to even one decision that referred to circumstances such as these. We find that in the context of this case, the actions of Mr. Omstead do not amount to a violation of the Act.

25. We referred earlier to publicity that grew out of the situations in which the parties found themselves in April 1986. Exhibit 3 is a copy of a newspaper report published in the Windsor Star on Tuesday April 26, 1986 entitled "Switch of Unions Called Threat to Plant". The applicant alleges that, although the Company did not cause this article to be published, it acted improperly and in violation of the Act when it did not take steps to deny the statements made in the article. On the basis of the evidence before us, the article seems to be an accurate reflection of the situation as it existed. In view of that, and in view of the evidence with respect to the impact of the article, the Board is of the view that this article had no material impact on the situation or the issues raised in this proceeding.

26. Subsequently the solicitor for the Company and the applicant's solicitor, Mr. Robitaille, were in touch with each other and a draft agreement was prepared and delivered by the former to the latter. Mr. Robitaille reviewed this draft with Mr. Simpson by telephone prior to meetings between the parties and their then solicitors on April 29, 1986. It is clear from the evidence of Simpson and witnesses called on his behalf, that he and the stewards were interested in having such an interim agreement and that they well understood that the purpose of the April 29, 1986 discussions would be to try to arrive at one.

27. Simpson and the stewards gathered at Mr. Robitaille's office on April 29, 1986. At that time they were given copies of the Company's draft proposal. This proposal and Mr. Robitaille's suggestions with respect to a counter proposal were discussed among them. They brought with them a typed document (Exhibit 9) about which we will have more to say later. Again it is appropriate to set Exhibit 9 out in full.

Whereas the dispute between Omstead Foods Ltd. employees and their bargaining agent Local No. 880 Teamsters, Chauffeurs, Warehousemen and Helpers is jeopardizing the well being of Farmers and Omstead Foods Ltd. We the stewards of Omstead's will agree to request the employees to enter into an Agreement with the Company whereby they will not strike the Company between the dates of April 11, 1986 and April 11, 1987.

The Company, to show its good faith, will:

- (1) not lock out its employees during this same period of April 11, 1986 to April 11, 1987.
- (2) not enter this dispute in any manner
- (3) pay its employees .58 per hour, Retroactive to April 11, 1986.

If the Teamsters remain the executive bargaining agent after the decertification hearing is concluded, then a ratification meeting will be held and the Company's final offer which was distributed in a letter form dated March 25, 1986 by the Company's Bargaining Committee and sent out under a covering letter by Gerald Omstead dated March 27, 1986 will be the one presented to the employees. If the Final Offer is ratified then everything is retroactive to the dates stated in the said FINAL OFFER.

When the decertification hearing is completed and if the Teamsters are decertified, then the Company will enter negotiations with the new union of our choice, with the stipulation that they will meet as soon after the hearing as possible, with the full knowledge that the new contract will cover all employees that are presently covered under the present Agreement. The new Agreement will still bear the dates of April 11, 1986 to April 10, 1988.

It was Mr. Robitaille's contention, not seriously contested by the applicant's witnesses, that this document contained proposals or suggestions as opposed to instructions. Again, we prefer the evidence of Mr. Robitaille and Mr. Blokker with respect to what transpired at or in the vicinity of Mr. Robitaille's office that day.

28. After discussing the matter with the stewards, Mr. Robitaille was instructed to attend at Mr. Kavanaugh's office (solicitor for the Company) and to attempt to obtain the following amendments:

- (a) an expiry date for the collective agreement of April 11, 1987,
- (b) changes in the preamble including a change in the reference from Roger Simpson to applicant;
- (c) to have the Union accept the termination application as being voluntary or timely.

29. Mr. Robitaille was successful in obtaining (b) and (c) but not (a). The Company was adamant on the December 31, 1986 expiry date for the collective agreement. The Company was also adamant on the timing of the vote; that is, no earlier than November 17, 1986. For some reason, and notwithstanding some assertions that they wanted the vote as soon as possible and the applicant and Simpson's counsel's assertion that it was the vote date that was important, it is clear

from the evidence that on April 29, 1986 the applicant and the stewards had focused on the the December 31, 1986 expiry date of the collective agreement as being the significant item. This was so in spite of the fact that their then solicitor, Mr. Robitaille, correctly in our view, advised them that it was the date of the vote and not the date of the expiry of the collective agreement that is significant in terms of the termination application.

30. Mr. Robitaille then returned to his office for further discussions with the applicant and the stewards. After further discussions over lunch, the applicant and the stewards did accept the agreements as they exist in their present form, less paragraph 9 of the second agreement. Mr. Robitaille was instructed to accept the proposals subject to making his best efforts to obtain a clause for an elected "committeeman" in the plant. However, he was also instructed not to "lose the deal over that."

31. Mr. Robitaille then returned to Mr. Kavanaugh's office and communicated the conditional acceptance. After some further discussions, paragraph 9 was inserted into the second agreement, and the solicitors for all concerned felt that they had a deal. The agreements, in their present form, were typed up and at between 3:00 and 3:30 p.m. Mr. Robitaille took five copies of each back to his office for Simpson's signature. The Board is of the view that at the time that he purported to enter into the agreement on behalf of Simpson at Mr. Kavanaugh's office, Mr. Robitaille had both the apparent and the actual authority to do so. At that moment there was an agreement.

32. Upon returning to his office, Mr. Robitaille found Mr. Simpson and Betsy Cabral on the telephone. He was handed the telephone and ended up speaking with both Larry Moynihan and Lawrence Cashin, both of whom are representatives of the UFCW. For the first time, it became clear to Mr. Robitaille that Simpson and the stewards were deeply involved with the UFCW and that they were taking their directions from that union and not from him.

33. Mr. Robitaille was advised by the stewards that they had changed their minds about signing the agreement and that they wanted 24 hours to "think about it" and they instructed him to obtain that 24 hours for them. Mr. Robitaille advised them that he was of the view that there already was an agreement, that he could not go back on his word, and that under the circumstances, he could no longer act on their behalf.

34. In addition Mr. Robitaille was of the view that the group wanted, not 24 hours to think about it, but to back out of the agreement. It is noteworthy that Simpson did not indicate to Robitaille that the stewards desired to take the matter up with the other employees. Mr. Robitaille then advised Mr. Kavanaugh of the applicant's refusal to sign the agreements and Mr. Kavanaugh came and retrieved the documents.

35. Subsequently the stewards attended at Mr. Kavanaugh's office without Mr. Robitaille. They asked for a 24-hour extension which extension Mr. Kavanaugh flatly refused on the basis that the agreements had to be in place that day because of the crop insurance deadline. He also explained the process of decertification, certification, conciliation and so on as this related to the timing of when certain things might happen. He then gave the stewards five minutes to decide whether they would sign or not sign. When they began to ask further questions of him, Kavanaugh indicated that it was Mr. Robitaille who should be answering these questions. Upon being told that Mr. Robitaille was no longer acting on their behalf Mr. Kavanaugh indicated that he would telephone Mr. Robitaille and get him to return to deal with the matter. Mr. Robitaille did in fact return, met with the stewards, and all eight, including Simpson, agreed that the agreements should be signed. Again there is no evidence that anyone of the stewards voiced any reservation about signing the agreements at that time. Mr. Robitaille then left Mr. Kavanaugh's office to attend another meeting back at his office. The agreements were signed by the other parties, and a copy

was handed to Simpson to take back to Robitaille's office. There, copies were made for Simpson and each of the stewards who then left. Sometime later that evening, they changed their minds again. Why? The applicant says that they were coerced and unduly pressured to sign the agreements by reasons and the actions and statements of the Company and that they wanted the 24 hours to seek some sort of ratification for their actions from the people.

36. The Board finds that those were not the reasons. In order to discover the real reasons one must first take the step back to examine the party that has in fact been the force behind this application from nearly its inception - the UFCW.

37. Simpson admits that when he and the stewards first decided to take formal steps to terminate the bargaining rights of the Teamsters, they approached and investigated other trade unions for the purpose of determining which might best replace the Teamsters. We have no evidence that any union other than UFCW was in fact approached by them. This happened sometime in March, 1986. No specific date was suggested. However, Mr. Robitaille (unknown to him) was one of several lawyers to whom Simpson was referred by Mr. Moynihan, the local president of UFCW. Furthermore, UFCW has indirectly paid Mr. Robitaille's fees (those that have been paid) in that it has reimbursed Simpson therefor. Since that application was prepared by Mr. Robitaille and is dated March 25 and since Robitaille was not retained until after the referral by Moynihan and "checking out" other lawyers, the first contact with UFCW must have been in early March, 1986.

38. Subsequently, and although this is not a displacement application, the applicant and his group began to collect signatures on UFCW membership cards. The applicant says UFCW is not directly involved. This simply cannot be so given his admission that he conferred with both Moynihan and Cashin, that Moynihan and Cashin provided him with advice, money for legal expenses, union cards, and the use of the UFCW union hall in Leamington, and the involvement of UFCW in matters relating to the agreements, both before and after these were signed. Further, a majority of persons in the bargaining unit had signed UFCW cards *before* the April 29, 1986 meeting.

39. In addition, Exhibit 9, the "proposals" brought by the applicant to Mr. Robitaille's office on the morning of April 29, 1986, were prepared and typed by the UFCW. This document goes far beyond what could be said to be the legitimate concerns of Simpson in his termination application. While it does mention the application, it makes no reference to any possible vote date. Instead it seeks to bargain on behalf of the stewards and other bargaining unit employees to the exclusion of the Teamsters, which is the only party entitled to bargain collectively on their behalf. It goes beyond even that and attempts to bargain on behalf of the "new union" (clearly the UFCW) if the application is successful. Mr. Blokker's evidence confirms the Board's suspicion that the stewards conferred with the UFCW with respect to Exhibit 9 prior to the April 29, 1986 meeting. Further, on April 29, 1986, at least Simpson and Betsy Cabral conferred directly with Mr. Moynihan or Mr. Cashin or both with respect to the agreements, both before and after the signings.

40. Simpson states that he and the stewards changed their minds with respect to the agreements because they were uncertain as to the acceptability of a December 31, 1986 expiry date for the collective agreement and because they felt under pressure. He says that they wanted to seek the opinion of the other employees. We do not believe it. Why were they troubled by the December 31, 1986 date when they knew that it was the November 17, 1986 date which was most significant for the termination application? How were they going to obtain an "opinion" from the other employees in 24 hours? If they did intend to seek such an opinion why did they not attempt to do so instead of going directly to the UFCW union hall? If they were so concerned about the opinion

of these other employees why did they not seek it and a mandate before April 29, 1986, since they knew of the "threats" and of the proposal of an interim agreement (to which they were amenable) by April 18, 1986? Did they vet Exhibit 9 with the people? There is no evidence that they did so and we are prepared to conclude that they did not. Why did they not raise a concern about the "threats" with their solicitor or seek to have some protection with respect thereto concluded in the agreements? Simpson provides the Board with no satisfactory answer to these questions.

41. It is also instructive to take a moment to analyze the "threat" that there would be layoffs from the perspective of the likely impact of such layoffs on the termination application, both standing alone and in the context of the November 17, 1986 vote date which Simpson now finds so offensive. In his evidence Simpson says that the stewards were under pressure to sign the agreements because they neither wanted to see hundreds of people out of work nor to be blamed for the layoffs. It is clear, however, that what he meant was that it was felt by some that such a layoff could hurt the termination application. He also said, that he didn't like the idea of a November 17, 1986 vote date because some employees would be laid off by then and because the Company would be in a position to lock out everyone else for six months. In fact, the evidence shows that if no contracts were given to the farmers (which would lead to the layoffs), it would be plant #2 which would be effected. While plant #2 employs some 250 to 350 people, only 80 to 90 of these are in the bargaining unit and it seems that not even all of them would be laid off. There is also no direct evidence of how plant #1 would be affected but it seems implicit from the evidence that plant #1 employees, where all the stewards appear to be employed, had no real cause to fear for their jobs. With respect to the vote date, it would appear from Betsy Cabral's evidence that it is highly unlikely that many, if any, employees would be laid off before late November 1986. Further, a November vote if successful (from Simpson's perspective) would not mean a six-month lockout, even if the Company was inclined to take such action. It would not be until sometime after the results of the vote were known that the Company would be in a position to lock out. Indeed, it is an earlier vote which, if successful (again from Simpson's perspective) would put the Company in a position to lock out earlier.

42. The real reason that they changed their minds was that the UFCW found the agreements unacceptable and, in effect, directed them to renege on the agreements. We heard from Mr. Simpson that upon discussing the matter with Mr. Moynihan during the evening of April 29, 1986, the latter expressed his displeasure with the dates because there could then be a strike all winter and the UFCW union cards might be found to be invalid in the planned certification application. The UFCW was not certified and already a strike was being planned! Further we have the evidence of Betsy Cabral. When it was put to her that the stewards (including Simpson) were taking their direction from the UFCW; that is Moynihan and Cashin, she agreed, and in response to the suggestion that but for Moynihan and Cashin they would not have wanted to back out of the agreement she replied, "They know a lot more about it", which the Board takes to mean "Yes". It is clear to this Board that not only were the actions of the Company not actually threats but they were not perceived to be such by the stewards.

43. The involvement of the UFCW subsequent to April 29, 1986 is also instructive. Moynihan and Cashin caused the stewards to terminate their relationship with their solicitor, Mr. Robitaille. Then a telegram (Exhibit 6) was sent to the Board over the name of Mr. Simpson to the effect that he did not wish the May 15, 1986 hearing date to be cancelled and that all further communications with respect to the matter should be with him directly. While it seems to have been sent with Mr. Simpson's authority, it was composed by Lawrence Cashin of the UFCW and sent and paid for by that union, while Simpson was at work. The telegram does not expressly repudiate the agreements or either of them. It was some time later that he purported to do so. It is noteworthy, however, that both Simpson and the other stewards accepted all the wage and other increases

under that part of Exhibit 5 of the second agreement that deals with the extension of the collective agreement. Subsequently Simpson retained Mr. Cumine for purposes of this hearing. Again, the referral came from the UFCW and again, they are paying the bills (we hasten to add there has been no improper conduct by Mr. Cumine). Further Simpson and the stewards are having their lost wages and expenses while in Toronto to attend this hearing paid for by the UFCW.

44. It is clear to this Board that the instigator of the current proceedings is not the applicant and his supporters but the UFCW. It is really this third party, this stranger to these proceedings, that is complaining, not the applicant.

45. Indeed, even at the hearing at this matter the applicant and his counsel could not seem to agree on what was wrong with the agreement that he now seeks to impugn. Simpson and his witnesses steadfastly maintain that the problem was and is the December 31, 1986 collective agreement expiry date and only by the way is the November 17, 1986 vote date a problem. Yet it is the latter that is stressed by Mr. Cumine on his behalf. Mr. Cumine says that that part of the second agreement dealing with the collective agreement can and should stand, including the December 31, 1986 date. To suggest that the applicant did not appreciate the distinctions and separations between the issues of the vote date and the collective agreement date conveniently ignores that they had the advice of their own solicitor and the UFCW throughout up to and including the moment that the agreements were signed. Even the company's position made the separation between the two obvious.

46. Counsel for the applicant was at pains to make it clear that he was not suggesting that the Company caused Exhibit 3 to be published but he does complain that the Company allowed the perception fostered by the article to continue. He also agrees that the Company has legitimate concerns but, he says, it was improper of the Company to express these concerns or to indicate that it was consulting a lawyer. He says that the Company had no business making *any* attempt to influence the date of the vote or any other matter connected with the termination application. He says that there was pressure that resulted from this improper conduct of the Company and that this pressure was undue and resulted in the loss by the applicant of his substantive right to a hearing before this Board.

47. For the Company, Mr. Kavanaugh identifies the real party that is trying to have the agreements set aside or at least not given effect to as being the UFCW. He denies that there was any impropriety of any kind on the part of the Company. Further, he submitted there is nothing in the agreements that has a negative impact on the termination application and further suggests that the applicant obtained a very real benefit in that any roadblocks to his application have been removed thereby. He submits that not only was it proper for the Company to include the applicant in the discussions, but that it would have been improper for the Company not to do so. He agrees that there was pressure, but submits that there was pressure on all involved and that in any case any such pressure was not undue.

48. For the Teamsters, Mr. Luce says that this is not a section 89 complaint and that the only issue is whether the request for the "agreed" date is acceptable to the Board. He submitted that there is no substantive right that has been affected - just a procedural right. He submits that there is no question as to whether or not there is to be a vote, which is the issue in such termination applications, but rather when the vote is to be held. In that respect, he submits that the Board should have regard to the reasonableness of the agreement and suggests that there is no reason for the Board to not give effect to the agreement. Setting aside or otherwise refusing to give effect to the agreement, he says, would only protract proceedings. Not only is the applicant not likely to get a vote before November, 1986 but he may now not get one at all. He says that the relevant ques-

tion is whether or not the Company has violated the Act and agrees with Mr. Kavanaugh's assertion that it has not. He also points out that the applicant is seeking the equivalent of equitable relief and the applicant has failed to come to this Board with clean hands because of the manner in which he has conducted himself and the involvement of the UFCW which amounts to a breach of section 67(2) of the Act.

The Law

49. What was the effect of Simpson's purported repudiation of that part of the agreements that relates to his termination application? A repudiation occurs when a party to an agreement indicates, by words or conduct, that he will not perform his part of the bargain. If the agreement is indivisible, that is, if it is expressly or impliedly that the obligation of one party is dependent or conditional upon complete performance by the other, a refusal to perform any part of the agreement will normally put the agreement to an end. However, if the agreement is severable, the innocent party is entitled to either specific performance, if that is available, or to damages for the breach but must otherwise continue with the contract. (See *Chitty on Contracts*, 24th ed. Vol 1, 1977, pages 698 to 701.) In the circumstances of this case it was unnecessary to include Simpson as a party to the extension of the collective agreement. Consequently, paragraphs 11 to 14 of the second agreement are severable from the first nine paragraphs. We are not persuaded that the provisions of the second agreement which relate to the extension of the collective agreement between the Teamsters and the Company formed any part of the consideration (as that term is understood in the law of contract) for the agreements set out in paragraphs 11 through 14. Indeed it is common ground that the Teamsters and the company could have agreed to the amendment and extension of the collective agreement without Simpson. In effect there are two separate agreements within one as is indicated by the evidence which includes the very existence of the first agreement. Consequently, the actions of the applicant were sufficient to constitute a repudiation of the first agreement. However, whether Simpson should be permitted to resile from the agreement or be held to it is another question.

50. Both in common law and in equity, a party to an agreement will not be held to it if he entered into it under duress or as a result of undue influence. The *Labour Relations Act* permits an employer the freedom to express his views on issues relating to the representation of employees by a trade union so long as he does not use coercion, intimidation, threats, promises or undue influence (sections 64, 66 and 70). Both the language and the goals of the common law and the Act are similar; that is, they seek to prevent one party from making improper use of its position to cause another to do or refrain from doing something that the latter would not otherwise do. Both address situations where there exists unfairness or inequality of bargaining power. Consequently the common law is of some assistance to the Board in this case. Insofar as there remains a distinction, the Board is of the view that these agreements are voidable rather than void. Indeed, there was implicit agreement between the parties on that point. It is trite law that for an agreement to be valid and binding, it must be entered into freely by the parties. This does not however mean that any form of pressure would render an agreement voidable. Agreements are not made under sterile laboratory conditions and it is unrealistic to suggest that anyone is entitled to decide whether or not to enter into an agreement free from any pressure whatsoever. Pressures are a part of life and many, or perhaps most, decisions in life are made under pressure, sometimes overwhelming pressure, such that one can say that the actor had no choice but to act as he did. The real question is whether or not pressure, once identified, is undue or improper.

51. A "threat" to take civil proceedings does not constitute the kind of duress that will render an agreement voidable except in circumstances where the person so threatened is unusually susceptible (as that term is defined in law) thereto. (See *Chitty on Contracts* 24th ed. Vol. 1, 1977, pages 203-206).

52. Depending upon the circumstances, economic pressures may constitute improper duress. There is no question that the bargaining relationship between employer and employee is an inherently unequal one and that the Act is designed to remedy this inequality. However, the mere fact that an agreement has been entered into in a situation where such an imbalance exists, does not by itself mean that the agreement is necessarily voidable. Rather it is necessary for the pressure to amount to, as was said in *Pao On v Lau Liu*, (1979) 3 All E.R. 65 (P.C.), “A coercion of will which vitiates consent”. In that case Lord Scarman, on behalf of the Privy Council, went on to explain at page 78:

In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract, he took steps to avoid it.

(See also *North Ocean Shipping Company Ltd. v. Hundai Construction Co. Ltd. (the Atlantic Baron)*, (1978) 3 All E.R. page 1170, (Q.B.), at pages 1180-1184.)

53. In another class of cases an agreement will be voidable if entered into in circumstances where there is a special relationship or inequality of bargaining power between the parties such that the weaker party can establish that the stronger took unfair advantage, either by actually applying pressure or as a result of a general fiduciary or trust relationship between the parties (see Waddams, *The Law of Contract*, 2nd ed. 1984, pages 384-386, and *Chitty on Contracts*, 24th ed. Vol. 1, pages 207-215). In *Lloyd's Bank v. Bundy*, (1974) 3 All E.R. 757 (C.A.), Lord Denning M.R. after saying at page 763 that “no bargain will be upset which is the result of the ordinary interplay of forces” suggested the general principle that ties together the cases of duress, unconscionable transaction, undue influence and undue pressure. Notwithstanding that the majority (which did not comment on Lord Denning’s dicta) decided the case on other more narrow grounds, the following passage (at page 765) is persuasive:

Gathering all together, I would suggest that through all these cases there runs a single thread. They rest on inequality of bargaining power. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other. When I use the word “undue” I do not mean to suggest that the principal depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being “dominated” or “overcome” by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that any transaction is saved by independent advice but the absence of it may be fatal.

54. What of the Board’s jurisprudence? If given effect, the agreement that the applicant seeks to impugn would operate as a bar, not to its application for termination, but to having the matter proceed in the usual way by way of a hearing before this Board. In that regard the Board stated in *C. E. Jamieson and Co. (Dominion) Limited*, [1985] OLRB Rep. Mar. 375 at page 380:

14. The Board has in past upheld a release as a bar to a complaint. In *Empire Public House* [1973] OLRB Rep. April 181, the Board upheld a release as barring an unfair labour practice complaint, noting that the complainant had not been misled in signing; the employer had not exercised undue influence; and the complainant was fully aware of the consequence of his actions. It is not clear from the decision which, if any, of the factors was of the greatest importance. It is clear from the cases cited to us, however, that the courts have been concerned with the equality of bargaining power. The courts appear to have been unwilling to uphold similar

such agreements where the dominant party has taken advantage of his position to extract favourable terms.

In effect the Board has taken the same direction as the courts in respect of these sorts of matters. In addition, the Board has said that the Act imposes a "simple" rule for the employer: "Do not interfere." (*Empco-Fab Ltd.*, [1982] OLRB Rep. Aug. 1162.) Though set in the context of a certification proceeding, it would seem to apply with equal force to a termination application. Clearly, however, as is recognized by the applicant in this case, an employer has legitimate interests and is entitled to express its views with respect thereto.

55. Section 64 of the Act prohibits interference with respect to the representation of employees by a trade union. Under section 70 it is a violation of the Act to seek, by intimidation, threat or coercion, to compel another to refrain from exercising his rights under the Act. It is unnecessary to prove that the latter was in fact intimidated or coerced (see *K. M. Sutherland*, [1983] OLRB Rep. July 1219). In the context of this case, section 66 merely underlines that the making of threats in order to compel a person to be or cease to be a member of a trade union or to cease to exercise any other rights under the Act is a violation of the Act. In *K Mart Canada Limited*, [1981] OLRB Rep. Jan. 60 the Board explained the meaning of the words "undue influence" as follows:

34. The Act protects the right of an employer to express its views about the representation of its employees by a union. The very scheme of the Act contemplates that union and employer will be opposed in interests. There is nothing in the Act that restricts or makes illegal an employer's predisposition to remain union free. An employer is free to communicate its feelings in that regard so long as it does not do so in a way that brings intimidation, coercion or undue influence to bear on its employees. Section 56 [now section 64] of the Act provides.

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

35. In *Words and Phrases Legally Defined* (London, 1970) undue influence is defined in part as:

"The unconscientious use by one person of power possessed by him over another to induce the other to enter into a contract."

In the context of *The Labour Relations Act* undue influence includes the unconscientious use by an employer of its power or authority over employees in order to induce them to forego their rights in relation to a union. An employer exerts undue influence on its employees, and thereby breaches the Act, when it takes unfair advantage of its position and authority in an attempt to sway the will of the employees. The line between legitimate employer expression and undue influence is not easy to draw in the abstract, and can only be assessed on a case by case basis.

In the circumstances of this case the same analysis is applicable.

56. In the context of the employer's right and freedom to express its views, the rule "do not interfere" means an employer must be careful not to use his power over its employees' economic situation to unfairly influence the latter's thinking (see for example *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848 at pages 1855-56).

57. In our view the Board has not said anything that differs in any material way from that which the courts have said. In determining whether or not there has been any impropriety that

caused the applicant to refrain from exercising any rights under the Act (which really is the question before us), we must determine whether or not the allegations of the applicant that the Company crossed the line between a proper exercise of its freedoms of speech and threats, intimidation or coercion have been made out. In that regard we find it useful to refer to the criteria used by the courts:

- (a) Did the applicant protest in a timely manner? - no.
- (b) Was there an alternative course of action open to him? - yes he could have proceeded without signing the agreements; there is no merit to the suggestion that this was not, under the circumstances, a viable option particularly since it is precisely that position that the applicant now asks that the Board put him in.
- (c) Did the applicant have any independent advice? - yes both legal advice from his own solicitor and other advice from the UFCW at all relevant times including the very moment that the agreements were signed.
- (d) Did the applicant take steps to avoid the agreement? - yes, though only those parts of the second agreement that do not suit him, or more correctly, which do not suit the UFCW.
- (e) Are the terms of the bargain unfair? - not in our view; the agreements are, under all the circumstances, reasonable. What has the applicant (as opposed to the UFCW) lost as a result of the agreements? - nothing. Indeed he (or the UFCW) has been saved much time and money and has had eliminated the possibility that his application might be found to be untimely or non-voluntary, has obtained a vote at a time which might be no later than he was likely to have obtained such a vote had he proceeded without the agreements.
- (f) "Equitable" considerations - We are not persuaded there is any "equitable" reason why we should ignore the agreements.

58. In the result the Board dismisses the applicant's request that the Board either void or not give effect to the two agreements that he made but now seeks to impugn.

59. Counsel for the Company has asked that the Board award costs to his client. In rejecting a request for costs in *Silknit Limited*, [1983] OLRB Rep. Nov. 1913, the Board stated as follows:

8. We are not entirely unsympathetic to the complainant's concern, for we recognize that a party may well have to expend substantial sums in connection with proceedings under the *Labour Relations Act*. Moreover, there is something to be said for the argument that if one can obtain costs upon the vindication of private law rights, the measure of compensation for the successful assertion of public rights guaranteed by statute should be no less generous. However, there are a number of difficulties with this superficially attractive proposition. In the first place, costs are not dealt with explicitly in the statute, with the result that it is arguable that the Board has no jurisdiction to award costs except as a part of the compensation award flowing from a finding of a statutory violation. Thus, there may be no authority to compensate a party respondent which has successfully resisted or defended against a claim. And how should one deal with a situation in which, from a practical or legal stand point, success is divided? The law of costs in the civil process is both technical and complex, and there are good policy reasons why it should not be readily imported into a law of collective bargaining which has survived without it for forty years

and which the laymen who operate within the system and regularly appear before the Board have some difficulty understanding as it is. Finally, while it is tempting to suggest that flagrant or egregious violations of the statute should result in a "make whole" remedy in which the aggrieved party is compensated for the costs of the proceedings, it is much less clear how one would distinguish an "ordinary" violation of the statute from a "flagrant" one or a frivolous assertion from one which is arguable but ultimately rejected. It is one thing to suggest that a serious breach of the *Labour Relations Act* may trigger special remedial considerations or call for ingenuity in fashioning the appropriate remedy: it is quite another to suggest that an "ordinary" breach of the Act yields one level of compensation while a "serious" one warrants a higher level of compensation. Such an approach would begin to look "penal" rather than "compensatory" (and see sections 96 - 99 of the Act which are expressly penal in character).

(See also *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755 and *Radio Shack*, [1979] OLRB Rep. Dec. 1220.) The Board has, in its previous decisions, set out compelling policy reasons for not awarding costs under section 89 of the Act. Consequently, while there may be cases in which it would be appropriate to make an "award" of costs (see *Academy of Medicine*, [1977] OLRB Rep. Dec. 783), this is not such a case. The intervener's request for costs is therefore denied.

60. Having regard to the circumstances of this matter and to the agreement of the parties as filed with the Board, we find that not less than forty-five per cent of the employees in the bargaining unit of the intervener presently represented by the respondent who were so employed at the time of the application herein have voluntarily signified in writing that they no longer wish to be represented by the respondent as of May 1, 1986, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the Act to be the time for ascertaining such signification under section 57(3) of the Act.

61. The Board therefore orders that pursuant to the provisions of section 57(3) a representative vote of employees in the bargaining unit be held but that such vote not be held earlier than November 17, 1986.

62. The Board directs the appointment of a Labour Relations Officer for the purposes of making the necessary vote arrangements.

63. Those eligible to vote are all persons who were employees of the intervener at the plants owned and operated by the Company in the Township of Ramney and Mersea, except watchmen, members of the Omstead family, working foremen and foreladies, those above the rank of working foremen and working foreladies, persons employed in the growing and harvesting of agricultural products, seasonal employees, office staff and quality control, pollution control and retail sales personnel, and students employed for the summer months from May 15th to September 15th (i.e. the employees in the bargaining unit) on July 7, 1986 who do not voluntarily terminate their employment or who are not discharged for cause between July 7, 1986 and the date the vote is taken.

64. The voters will be asked to indicate whether or not they desire to be represented by the Teamsters, Chauffeurs, Warehousemen and Helpers Local No. 880 in their employment relations with Omstead Foods Limited.

65. The matter is referred to the Registrar.

1402-85-M Labourers' International Union of North America, Local 1059, Applicant, v. **Ontario Hydro**, Electrical Power Systems Construction Association, Respondents

Construction Industry Grievance - Parties - Whether local can bring grievance under s. 124 when collective agreement between EPSCA and Allied Council - Distinction between being bound by a collective agreement and being a party to a collective agreement discussed

BEFORE: *D. E. Franks*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

DECISION OF THE BOARD; August 29, 1986

1. This is the referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The present application is brought by Labourers' International Union of North America, Local 1059 ("Labourers' Local 1059") and raises the question as to whether that local is entitled to bring a grievance under section 124 of the Act pursuant to a collective agreement between the Electrical Power Systems Construction Association and the Ontario Allied Construction Trades Council.

3. In a previous decision, *The International Brotherhood of Teamsters and the Electrical Power Systems Construction Association* [1976] OLRB Rep. Dec. 825, this Board found that the International Brotherhood of Teamsters, a member of the Allied Construction Trades Council was not entitled to bring a grievance under the collective agreement between the Allied Council and EPSCA because on the wording of the agreement that trade union was not a party to the collective agreement and since it was not a party it did not have status to bring a grievance or a section 124 application before the Board. At the time that case was decided, section 124 or 112(a)(1) as it was at that time read as follows:

Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, *either party* to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

[emphasis added]

Subsequently, section 112(a)(1) was amended to changing the words "either party" in the third line to "a party" and the section continued in that form to the present day. It is to be noted that the amendment to the Act changing the expression "either party" to the expression "a party" would not change the outcome of the previous EPSCA decision referred to since the crux of the finding in that case is that the Teamsters were not a party to the collective agreement.

4. The collective agreement before this panel of the Board is substantially the same collective agreement as was before the Board in 1976 and it is clear that Local 1059 of the Labourers' International Union is not a party to that collective agreement for the same reasons that the Teamsters were not a party in the previous decision. That agreement was and remains an agreement between EPSCA and the Allied Council. See *The International Brotherhood of Teamsters and the Electrical Power Systems Construction Association* [1976] OLRB Rep. Dec. 825:

12. The Board has closely analyzed the collective agreement before it and has concluded that it is what it purports to be, namely, a collective agreement entered into between EPSCA and the Council. While the applicant and members of the applicant may be bound by the agreement, the applicant is not a separate party to the agreement. In reaching this determination we have considered the entire collective agreement and in particular those articles referred to above. However, of major importance in our determination are the headings of the agreement, wherein it states that it is "by and between" EPSCA and the Council, as well as Article 1.1 wherein EPSCA recognizes the Council as the exclusive bargaining agent for the one bargaining unit covered by the agreement. The fact that the arbitration procedure set out in the collective agreement is stated to be restricted to use only by EPSCA and the Council, while not determinative of the matter by itself, is, we feel, a strong indication that only the Council and EPSCA were intended to be parties to the agreement. We recognize that if one were to look at the signing page of the agreement by itself it is arguable as to whether the representatives of the individual unions were signing as the representatives of separate parties to the agreement or as part of the Council's signatory team. However, having regard to the full text of the collective agreement the Board feels confident that the representatives of the individual unions signed as members of the Council's signatory team. In this regard we would note that all such signatures fall under the column headed up in bold type "For: ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL."

5. Counsel for the applicant urges the Board in the present case to adopt the position that since Local 1059 is bound by the collective agreement, that it therefore ought to be a party to the collective agreement. He further cites Article 7 of the collective agreement which reads as follows:

Article 7

ACCREDITED UNION REPRESENTATIVES

- 7.1 The senior representative of each Union will designate local union representatives as Accredited Union Representatives to handle the day-to-day administration of this Agreement on the basis of not more than two representatives from each Union for each Project and a suitable number for each Lines and Stations Construction Zone. The Council will notify the General Manager of EPSCA in writing of the names of such Union representatives, or alternates in the event of illness or unavailability, so that they may be issued identification cards to permit entry to the site. Such representatives, after identifying themselves to the EPSCA representative upon entering the job site, will be free to observe the progress and conduct of the work and to conduct normal union business. The Council undertakes that these representatives will not hinder or interfere in any way with the said work.

Clearly, that section does not make a local union party to a collective agreement. At best, it merely indicates a form of participation in the agreement by the local union.

6. At the root of the problem in the present case is the distinction between being bound by a collective agreement versus being a party to the collective agreement. From its earliest form the *Labour Relations Act* has recognized that there is a distinction between a party to an agreement and the matter of being binding. See, for example, section 50 of the Act which reads as follows:

A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

There the employer and trade union are parties whereas the employees are bound by the collective agreement.

7. The matter becomes more complex particularly in the construction industry, where the agreements are multi-employer agreements and the union side is frequently a council or certified council of trade unions. Thus, for instance, in the provincial bargaining provisions of the *Labour*

Relations Act by section 147(3) the problem as to status as a party to a provincial agreement is specifically dealt with:

Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purposes of section 124.

8. In the present case it is clear that the parties to the agreement specifically limited who were parties to that collective agreement as distinct from who are bound by the collective agreement, and having structured their affairs with such a distinction in mind it would not be appropriate for this Board to interfere with that distinction. The fact that the applicant local may be bound by the collective agreement does not in and of itself make it a party to the collective agreement since that agreement clearly limits the parties to the agreement to EPSCA and the Allied Council.

9. For the foregoing reasons, therefore, this grievance is dismissed.

0114-85-U; 0117-85-M Lumber and Sawmill Workers' Union, Local 2995 of The United Brotherhood of Carpenters and Joiners of America, Complainant/Applicant, v. **Rexwood Products Limited**, Respondents

Arbitration - Employee Reference - Practice and Procedure - Witness - Whether individual an "employee" - Board not deferring to arbitration - Whether witness entitled during cross-examination to discuss with own counsel whether specific questions must be answered - Applicability of Rules of Professional Conduct and Statutory Powers Procedure Act

BEFORE: Robert J. Herman, Vice-Chairman, and Board Members R. J. Gallivan and L. C. Collins.

APPEARANCES: Paul Falzone, Marcel Lacroix, Sid Adams and Rocky Skinner for the complainant/applicant; Michael G. Horan and Jack Lacarte for the respondent.

DECISION OF THE BOARD; August 9, 1986

1. These two matters are a complaint filed pursuant to section 89 of the *Labour Relations Act*, alleging violations of sections 50, 64 and 67 of the Act, and an application pursuant to section 106(2) of the Act asking that the Board determine whether a particular individual is an "employee" for the purposes of the *Labour Relations Act*.

2. The union alleges that an employee within the bargaining unit, Mr. Gaetan Touzin, has improperly been removed from the unit, either by the respondent employer attempting to engage Mr. Touzin to perform the same work on a "contracted out" basis, or alternatively, by seeking to promote him to a supervisory position outside the bargaining unit. In its application under section 106(2), the union alleges that there has been no material or substantial change in Mr. Touzin's duties and responsibilities and further, that Mr. Touzin does not exercise managerial functions within the meaning of section 1(3)(b) of the Act. The union further alleges that the respondent employer was motivated by a desire to avoid dealing with the union and is in violation of sections

64 and 67 of the Act in that regard. The employer's attempt to exclude Mr. Touzin from coverage under the collective agreement is allegedly contrary to section 50 of the Act. After receiving submissions on the issue, the Board directed that these proceedings be consolidated.

3. Counsel for the respondent then asked that the Board defer consideration of these consolidated proceedings, to allow resort to arbitration. In counsel's submission the Board ordinarily defers to arbitration, while retaining jurisdiction, when the subject matter of the proceedings, although involving an alleged breach of both the collective agreement and a violation of the *Labour Relations Act*, can be dealt with adequately and fully by an arbitration board. The Board ought to defer, to allow the parties to attempt to resolve their dispute through the arbitration process, where no "earthshaking" principle is involved. Counsel undertook, on the respondent's instructions, that the respondent employer would not raise any objections at arbitration on the basis of timeliness. The Board was referred to *Fleet Industries*, [1983] OLRB Rep. Nov. 1835. In response, counsel for the union noted that the primary issue for consideration by the Board under section 106(2) in the circumstances of this case is whether the individual in question in the opinion of the Board exercises managerial functions within the meaning of section 1(3)(b) of the Act and therefore whether such individual can be considered an "employee" for purposes of the Act. Consideration of that issue lies exclusively with the Board, as noted by the very wording of section 1(3)(b) and section 106(2). Counsel referred the Board to *Metro Windsor Essex County Health Unit*, [1985] OLRB Rep. Aug. 1287.

4. The Board orally ruled that it would not defer to arbitration. It is apparent that a decision either by this Board or by an arbitrator will not necessarily finally resolve that issue. The relevant provisions of the *Labour Relations Act* read as follows:

1(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

...

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

106(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

5. The Board considered this issue in *Northern Telecom*, [1983] OLRB Rep. July 1134, where it stated:

2. The purpose of section 1(3)(b) is to ensure that persons in the bargaining unit are not faced with a conflict as between their interests as members of the bargaining unit, and such obligations to their employer as may arise from the exercise of managerial responsibilities. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose objectives are sometimes divergent. This conflict of interest problem is avoided by excluding "managerial" personnel from the definition of "employee" and, therefore, from coverage by the Act or participation in collective bargaining. The line is drawn where, *in the opinion of the Ontario Labour Relations Board*, an individual exercises "managerial functions". That decision is final and binding for all purposes (see sections 106 and 108).

3. One of the ways in which an employee status issue can come before the Board is under section 106(2), when a question arises between the parties as to whether an individual is, or is not, an "employee" *for the purpose of the Act*. It is important to note, however, that the issue before the Board under section 106(2) concerns the application of the statute and the statutory defini-

tion of the term "employee" - not whether an individual is covered by a collective agreement. That is a somewhat different issue.

4. A collective agreement has no common law foundation. Its legal characteristics are drawn from the Act, and by definition (see section 1(1)(e)), it prescribes the terms and conditions of "employment" for "employees" represented by the union which, in turn, is an "organization of employees". Moreover, (see section 50) it is only binding upon "the employees in the bargaining unit" defined in it. In both cases, the term "employee" must be taken to exclude persons who by virtue of section 1(3)(b) are not "employees" under the Act. Indeed, given the array of provisions designed to ensure the separation of employer and employees (see sections 1(3)(b), 13, 48, 64 and 106) it would be anomalous if management were in the bargaining unit or covered by the collective agreement. It follows that if an individual exercises managerial functions he is not an "employee" under the Act, and cannot be considered an "employee" for collective bargaining purposes, or to whom the negotiated collective agreement applies. Finally, since employee status under the Act turns on the opinion of the Ontario Labour Relations Board, it is doubtful whether an arbitrator under a collective agreement has any jurisdiction to resolve this issue. It is the opinion of this Board in the exercise of its exclusive jurisdiction which is determinative.

5. For the foregoing reasons, a Board determination that an individual exercises managerial functions and is not an "employee" under the Act may well be determinative of his status under a collective agreement. If, in the opinion of the Board, he exercises managerial functions, then he is not an employee, and the agreement cannot apply. On the other hand, if, in the opinion of the Board, he does *not* exercise managerial functions then he is an employee under the Act to whom the agreement *may* apply depending on its terms. But it does not necessarily follow that "all employees" will be covered by an outstanding collective agreement. These employees are not covered by the agreement even though they are legally eligible for coverage. Likewise, it is not unusual for disputes to arise between the parties about the application of the agreement to individuals who are clearly employees, but who may nevertheless be beyond the scope of the agreement because the contractual language is not broad enough to cover their job classifications. These are questions which must ultimately be resolved by arbitration, since they involve the interpretation of the collective agreement. Of course, if the dispute centres on a term such as "foreman", "supervisor", or other word intended by the parties to denote managerial status, then the Board decision will probably resolve the interpretation problem and make a resort to arbitration unnecessary. It is unlikely that the parties intended such terms to include persons who are not really "managerial" under the Act.

6. To summarize then:

- (a) If the issue between the parties involves the status of an employee under the Act, then the Board has exclusive jurisdiction to determine the issue.
- (b) The fact that an individual is an employee under the *Labour Relations Act* does not necessarily mean that he falls within the negotiated scope of any particular collective agreement.
- (c) If an individual is admitted to be an employee under the Act then his inclusion in a negotiated bargaining unit is for an arbitrator to determine.
- (d) Where the parties' dispute involves language denoting managerial status, the Board's decision with respect to who is "management" for the purposes of collective bargaining under the Act, will likely be sufficient to resolve the dispute.

6. And as the Board stated in *Metro Windsor Essex County Health Unit, supra*:

4. It is the desire of the Board to provide guidance to the parties which will enable them to deal with this issue as fully and as expeditiously as possible. Unfortunately, as the above references show, a question exists whether any single proceeding will necessarily be determinative. There may be limits on the jurisdiction of an arbitrator, for example, to finally decide the matter in dispute, in light of the words 'in the opinion of the Board' in section 1(3)(b) of the *Labour Relations Act*. On the other hand, a determination by the Board that a person is an "employee" for

the purposes of the Act, and therefore *eligible* for coverage by a collective agreement, will not necessarily answer the question whether that person is covered by the existing scope of a *particular* collective agreement, as the Board often notes in its appointments under section 106(2).

5. Here the issue appears to be essentially a "managerial" one, together, perhaps, with the additional issue of labour-relations confidentiality included under section 1(3)(b). These are matters normally dealt with by the Board. It may be, having regard to the comments of the Board referred to above, that a determination of those issues by the Board will eliminate the need for further proceedings *whichever* way the Board decides the question.

7. We adopt the analysis of the Board in these two quoted decisions. It is worth noting as well that in the two cases referred to by counsel the Board declined to defer to arbitration and did inquire into the issue under section 106(2).

8. For the above noted reasons, it did not appear to the Board that deferral to arbitration was appropriate. While a particular arbitration decision may very well resolve all the outstanding disputes, it is at least equally likely that a decision of the arbitrator will not finally resolve these matters. Had these two consolidated matters been proceeded with individually, the Board would be inclined not to defer to arbitration, and the fact of consolidation merely reinforces us in this view. It is more likely that a Board decision will settle all matters than will a decision of an arbitration board. The Board accordingly declined to defer to arbitration.

9. In a proceeding pursuant to section 106(2) of the Act the Board would ordinarily appoint a Board Officer to inquire into and report to the Board on the duties and responsibilities of the individual in question. Nevertheless, given the consolidation of these proceedings and the overlap of the issues raised by the section 106(2) application and section 89 complaint, the Board proceeded to hear the evidence directly.

10. The union called as its first witness Rocky Skinner. During the course of his direct examination, Mr. Skinner was asked questions about events which occurred prior to those pleaded in the complaint and application, including questions with respect to Mr. Touzin from the time of his hiring in 1978 up to the events more directly in question in 1985, and with respect to events surrounding a strike which occurred between July 1983 and July 1984. The Board indicated it would allow evidence of these events, but only insofar as the evidence related to any perception the employees might have gained from those events, rather than in support of any allegation that the company had acted in an improper manner with respect to those events.

11. After these rulings, union counsel completed his direct examination of Mr. Skinner. During cross-examination, respondent counsel asked Mr. Skinner about certain conversations which had occurred around the time of the strike and, more particularly, which individuals or supervisors had participated in these conversations. Counsel for the union objected to this line of questioning, on the ground that it would put the individuals in question in jeopardy. Although no specifics of such jeopardy were suggested, as these individuals were supervisors presumably the jeopardy counsel spoke of concerned reprisals from the respondent. Counsel suggested that the Board could assess the credibility of the witness without an answer to this question, and further, the names of the supervisor or supervisors were not relevant as it was not relevant to whether the employees' perceptions (put in issue by the union) existed. The Board ruled that this line of questioning was arguably relevant, that counsel for the union had placed in issue the employees' perceptions arising out of the strike related events, and conversations which the witness might have had at that time with supervisors were relevant to that issue.

12. Counsel for the union continued to object, suggesting that the Board ought not to direct

that the witness answer these questions on three different grounds. First, the nature of the conversations was confidential, the information belonged to the supervisors in question, and it could not be disclosed without their consent. In essence counsel was suggesting that the supervisors somehow had a proprietary right to this information and that right could not be interfered with by the Board. The Board is unaware of any such privilege on this ground either at common law or created by statute, and in any event the particular question asked by respondent counsel was *who* had made the statements or carried on the conversation and not what had been said. Second, privilege was raised as an undefined, unarticulated general concept. Counsel was unable to indicate the legally recognized nature or class of the privilege involved in the instant situation. Third, counsel suggested that the evidence was hearsay and ought to be excluded on that ground. As already noted, cross-examining counsel had not been asking about the content of the statements made, and accordingly no hearsay question was involved.

13. After consideration of the above-noted submissions, the Board confirmed its ruling that the questions were proper and the witness was directed to answer them. Mr. Skinner still refused to answer the questions, as in his view to provide the names requested would be to involve totally innocent people "in trouble". The Board explained to the witness its powers to direct that a witness answer, and the potential consequences should a witness continue to refuse to do so. More particularly, the Board explained to the witness the powers and procedures contained in section 13 of the *Statutory Powers Procedure Act*, and that a potential result of a stated case to the Divisional Court under that section might be a fine or imprisonment or both.

14. The witness thereupon indicated to the Board that he would like to retain and consult with his own counsel before deciding whether or not to answer the questions as directed by the Board. Counsel for the respondent objected to Mr. Skinner being allowed to so consult, in the midst of cross-examination. As this request was made at the end of the hearing day, the Board reserved on this question, directed Mr. Skinner not to discuss his testimony until the Board had issued its decision and adjourned the proceedings. We now provide our decision and reasons.

15. Except for the Board's direction prohibiting Mr. Skinner from discussing his testimony with anyone, there would not appear to be any impediment to his discussing with counsel he retains our direction that he answer a specific question. As a general proposition, a witness is free to discuss his or her evidence with anyone until they begin to testify, or until and unless the Board otherwise directs. Once a witness commences to give evidence, any discussions with counsel during recesses and adjournments would presumably be subject to ethical considerations always applicable to counsel when conversing with witnesses. In this regard, we would refer to the Rules of Professional Conduct of the Law Society of Upper Canada, Rule 8, Commentary 15, which reads, in part, as follows:

15. The lawyer should observe the following guidelines respecting communication with witnesses giving evidence:

- (a) During examination in chief by the lawyer of his own witness: it is not improper for such lawyer to discuss with the witness any matter that has not been covered in the examination before such discussion.
- (b) During examination in chief by another lawyer of his witness who is not sympathetic to the lawyer's cause: it is not improper for the lawyer (not conducting the examination in chief) to discuss the evidence with such a witness.
- (c) Between completion of examination in chief and commencement of cross-examination of the lawyer's own witness: there ought to be no discussion of

the evidence given in chief or relating to any matter introduced or touched upon during the examination in chief.

- (d) During cross-examination by an opposing lawyer: while his witness is under cross-examination the lawyer ought not to have any conversation with him respecting his evidence or relative to any issue in the proceeding.
- (e) Between completion of cross-examination and commencement of re-examination: the lawyer whose witness is to be re-examined by him ought not to have any discussion respecting evidence that will be dealt with on re-examination.
- (f) During cross-examination by the lawyer of a witness not sympathetic to the cross-examiner's cause: it is not improper for such lawyer to discuss with such a witness the evidence of that witness.
- (g) During cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause: in this case conversations ought to be restricted as in the case of communications during examination in chief of one's own witness.
- (h) During re-examination of witness called by an opposing lawyer: if the witness is sympathetic to the lawyer's cause there ought to be no communication relating to the evidence to be given by that witness during re-examination. If the witness is adverse in interest, it does not seem improper for such lawyer to discuss the evidence of that witness with him.

16. While Commentary 15(d) suggests that counsel who called a witness ought not to discuss with him or her certain matters once cross-examination commences, such restrictions would not seemingly apply to consultation with counsel retained independently by and for the witness and, in any event, the Board has no authority to apply the Rules of Professional Conduct. In this regard the Rules of Professional Conduct must be read in light of Section 11 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, which reads:

- 11(1) A witness at a hearing is entitled to be advised by his counsel or agent as to his rights but such counsel or agent may take no other part in the hearing without leave of the tribunal.
- (2) Where a hearing is in camera, a counsel or agent for a witness is not entitled to be present except when that witness is giving evidence.

It appears to the Board that this section gives a witness, such as Mr. Skinner, the right to discuss with his own counsel, during a recess or adjournment in the midst of cross-examination, whether he must answer a specific question. To allow such consultation would be consistent with section 11 and would not appear to unfairly prejudice cross-examining counsel.

17. For these reasons, we revoke our prior direction to Mr. Skinner prohibiting him from discussing with anyone his testimony or our direction that he answer a particular question. Mr. Skinner is free to discuss such matters with counsel he retains, provided neither he nor his counsel disclose to any potential witness the evidence already given. We confirm our order excluding witnesses and direct all participants to refrain from advising future witnesses of any evidence led in this proceeding, prior to such witnesses having fully completed their testimony. This direction applies to all participants, including any counsel Mr. Skinner may retain.

18. This matter will be scheduled for further hearings. Counsel for the union, who called Mr. Skinner as a witness, is hereby directed to serve a copy of this decision on Mr. Skinner.

0269-86-R Peter Kunkel (Full-Time Employees of R.L.D. Electric), Applicant, v. International Brotherhood of Electrical Workers, Local 353, Respondent, v. 618830 Ontario Ltd. c.o.b. as **R.L.D. Electric**, Intervener

Termination - Timeliness - Union certified following three-way vote - Union immediately bound by provincial collective agreement - Termination application filed nine days later during open period of provincial collective agreement - Board exercising its discretion under section 103(2)(i) to refuse application

BEFORE: Ken Petryshen, Vice-Chairman, and Board Members W. H. Wightman and C. A. Barentine.

APPEARANCES: Peter Kunkel for the applicant; Bernard Fishbein and Michael Lloyd for the respondent; Carl W. Peterson and Jay Joffe for the intervener.

DECISION OF THE BOARD; August 19, 1986

1. The name of the respondent is amended to read: "International Brotherhood of Electrical Workers, Local 353".
2. This is a termination application pursuant to section 57 of the *Labour Relations Act*.
3. After the parties met with a Labour Relations Officer, counsel for the union advised us at the commencement of the hearing that he was requesting that the Board refuse to entertain the application pursuant to clause (i) of section 103(2) of the Act. The parties agreed it would be appropriate to adjourn the hearing pending the Board's decision on the issue raised by the respondent. Accordingly, this decision is confined to that issue.
4. The parties agreed on the material facts. On January 31, 1986 the International Brotherhood of Electrical Workers, Local 353 ("Local 353") filed an application for certification with the Board pursuant to the construction industry provisions of the Act for a unit of the intervener's employees (Board File No. 2662-85-R). An entity called the Association of Independent Electrical Workers ("the Association") filed an application for certification with the Board on February 4, 1986 for a similar unit of the intervener's employees (Board File No. 2693-85-R). To date, a determination has not been made with respect to the Association's status as a trade union. A petition was filed by employees who objected to the certification of the Association as their bargaining agent. In addition to the competing claims for bargaining rights, Local 353 filed with the Board an application under section 1(4) of the Act, as well as a complaint under section 89 of the Act, the details of both being irrelevant to the disposition of this issue.
5. The parties to the proceedings referred to above entered into Minutes of Settlement on March 18, 1986. The parties agreed the representation issue would be determined by means of a three-way representation vote in which the employees would have the option of voting to be represented by Local 353, to be represented by the Association, or to remain without a union. By decision dated March 21, 1986, the Board (differently constituted) confirmed the substance of the Minutes of Settlement and directed the taking of a representation vote.
6. The vote was held on April 2, 1986. Local 353 won the vote since it was able to obtain twelve votes to the Association's eleven. In a decision dated April 14, 1986, the Board pursuant to section 144(2) of the Act, indicated a certificate would issue to Local 353 on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency in respect of all

electricians and electricians' apprentices in the employ of the employer in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above that rank. As well, the Board indicated a certificate would issue to Local 353 in respect of all electricians and electricians' apprentices of the employer in Board area #8 excluding the ICI sector, save and except non-working foremen and persons above that rank. In the same decision, the Board dismissed the Association's application for certification.

7. Once the certificate issued, Local 353 and the intervener became bound by a provincial collective agreement covering work performed in the ICI sector of the construction industry which expired on April 30, 1986. As a result of an accreditation order, these parties became bound as well by a collective agreement covering work performed in the residential sector of the construction industry in Board area #8 which expired on April 30, 1986. The "open period" for each of these collective agreements consists of the months of March and April, 1986.

8. The instant application was filed with the Board on April 23, 1986, nine days after the Board certified Local 353 as the bargaining agent of the intervener's employees. Counsel for the respondent concedes the application was filed during the "open period" and in that sense is a timely application.

9. In the Minutes of Settlement referred to above, the parties agreed that twenty-three named employees were entitled to cast a ballot in the representation vote. The list of employees filed by the employer in the instant application has on it the names of sixteen individuals and only two of these employees were not included on the voters' list in the previous proceedings. These latter two persons have been challenged by the union on the grounds that they were not employed on the application date or that they exercise managerial functions. In essence, then, the employees who were working on the date the termination application was filed with the Board were affected by the earlier certification proceedings. The applicant, in particular, was employed by the intervener at the time of the earlier proceedings. Mr. Kunkel was elected treasurer of the Association in his absence although it is agreed that he never assumed any responsibilities associated with that position.

10. Counsel for the respondent urged us to refuse to entertain the termination application. In his submission, the unsuccessful application which brings this situation within the scope of clause (i) of section 103(2) is the certification application of the Association which was dismissed by the Board in its decision of April 14, 1986. In exercising our discretion, counsel asked us to consider the fact that the representation issue had been decided a short time before the termination application was filed with the Board and that the representation issue was decided by means of a vote which included a no union option. The parties, counsel argued, should have the opportunity to develop a sound collective bargaining relationship and, for this purpose, a period of stability was required. Counsel referred us to the following decisions: *Trinidad Leaseholds (Canada) Ltd.* 52 CLLC 17,005; *Filey-Hall Paper Box*, 52 CLLC 17,037; *Windsor Lumber Co. Ltd.*, 58 CLLC 18,104; *Seven-Up*, [1971] OLRB Rep. Dec. 791; and *Dunnville Supermarket*, [1980] OLRB Rep. Aug. 1193.

11. Counsel for the employer submitted that the Board had no discretion to refuse to entertain the termination application since section 57 is a mandatory provision. If we find the application timely and also find it is voluntarily supported by not less than forty-five per cent of the employees in the bargaining unit, counsel contended that we were required to direct the taking of a representation vote. If we had such a discretion to exercise, counsel suggested we should recognize as paramount the right of the employees to terminate their agents bargaining rights and he argued

that the union has not provided the Board with any basis for departing from this approach. The applicant essentially took the position that the application was timely and that the Board should direct a representation vote.

12. The relevant sections of the Act provide as follows:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

* * *

103.-(1) The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

• • •

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;

• • •

13. The Board does not accept the argument that it lacks jurisdiction to refuse to entertain a termination application made under section 57(2). We agree with the following comments of the Board in *Browning-Ferris Industries Ltd.*, [1982] OLRB Rep. Sept. 1253, in respect of a similar argument:

The Board does not agree with counsel. Section 103(2), clause (i) gives the Board the discretion to refuse to entertain *any* application for which the Act makes provision. If the Legislature intended the Board's discretion to be exercised only with respect to applications made under the permissive sections of the Act, it would have said so in clear terms and it has not. It follows, therefore, when the Board is exercising its discretion under clause (i) with respect to any application made under another provision of the Act, it is acting within its clear jurisdiction.

[emphasis added]

14. The facts in this case permit the respondent to make the argument based in clause (i) of section 103(2). The Board has the power to refuse to entertain an application made "by any of the employees affected by an unsuccessful application". Mr. Kunkel obviously was affected, along with other persons employed at the relevant time, by the Board's decision dismissing the Association's application for certification. The question we have to decide is whether it is appropriate in the circumstances before us to refuse to entertain the termination application. In dealing with this question we have kept in mind the comments of the Board in *Soo Dairies Limited*, [1971] OLRB Rep. July 439, wherein the Board stated at p. 441:

Any jurisdiction we have to refuse to entertain this application must therefore be found in section 77(2)(1) (now section 103(2)(i)) of the Act. While we have a discretion to refuse to entertain a new application following the dismissal of an earlier application, that discretion must be exercised in a judicious manner. Our discretion cannot be arbitrarily predetermined by adopting present rules such as the doctrine that a party is only entitled to "one bite of the cherry". Before our discretion can be judiciously exercised we must assess all relevant facts of the case.

15. A newly certified bargaining agent is given a period of time by the Act to establish a bargaining relationship and to negotiate a collective agreement free of challenges to its bargaining rights. Section 123(1), for instance, provides a trade union in the construction industry with a period of six months to negotiate a collective agreement without having to face a termination application. Such legislative provisions reflect a balancing between employee wishes and the requirement of stability for meaningful negotiations. See *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. April 468. Although it has just been certified, the respondent in this case cannot benefit from the stability provided by section 123(1) since, upon certification, it became bound by collective agreements covering work performed in the ICI and residential sectors.

16. Unable to rely on section 123(1) of the Act, the respondent bases its argument on section 103(2)(i) even though the circumstances before us are quite different from the facts in the cases referred to us by counsel for the respondent. In these cases, a union, party to a collective agreement, was faced with a second challenge to its bargaining rights in a short period of time. An unsuccessful application was followed, quite quickly by either a certification or termination application and it was in this context that the Board had to decide whether it would refuse to entertain the second application. In these situations, the Board generally takes the approach that once a representation issue has been dealt with on its merits, in the absence of special circumstances an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate that it can successfully negotiate a collective agreement. See, for example, *Seven-Up (Ontario) Limited*, *supra*. In this case, there has not been an unsuccessful challenge to the respondent's bargaining rights followed by another application. The unsuccessful application relied upon by the union arises out of the initial contest for bargaining rights. This termination application represents the first attempt to dislodge Local 353 as the bargaining agent for the intervener's employees.

17. It is also worth noting that the comments in the cases which relate to the desirability of giving the parties the opportunity to negotiate a collective agreement appear to be of less importance in the construction industry with the advent of provincial bargaining. With provincial bar-

gaining, the employer and union in this case will in all likelihood play a very minor role, if any, in the negotiation of the collective agreement which will apply to them.

18. In addition to the above considerations which would appear to favour entertaining this application, we are not unmindful of the fact that but for the Association's unsuccessful certification application, the Board would not have any power to refuse to entertain the termination application. If Local 353 had been certified in April, 1986, in a situation in which no intervening application for certification had been filed, the Board would not have the jurisdiction to refuse to entertain this termination application or a displacement certification application filed in a timely manner.

19. Notwithstanding those considerations, it appears to us that the position taken by counsel for the respondent has considerable merit. After certification, the parties require a period of time in order to develop a sound bargaining relationship. The employer, trade union and the employees need an opportunity to develop an understanding of what it means to operate and to work within a collective bargaining regime. This is particularly so in the ICI sector and perhaps also in other sectors of the construction industry where parties may not be active participants in the bargaining process. Since the collective agreement which binds them is negotiated by others on their behalf, the only avenue for the development of the relationship is the day-to-day administration of the collective agreement. The recognition that a period of time is needed for the parties not only to negotiate a collective agreement, but also to provide a basis for creating a bargaining relationship, is implicit in sections such as section 123(1) of the Act. Although section 123(1), as indicated above, cannot assist the respondent in this case, we are nevertheless of the view that the respondent should be given the opportunity to develop a viable collective bargaining relationship.

20. If this application is permitted to proceed and the applicant is able to establish that his petition represents a voluntary expression of those employees who signed it, the Board would direct the taking of a representation vote to determine if the employees wanted Local 353 to continue to be their bargaining agent. However, that very representation issue was determined a mere three weeks prior to the filing of this termination application by means of a representation vote. When the employees were confronted at that time with a choice between Local 353, the Association, or remaining non-union, the majority chose Local 353 as their bargaining agent. With this termination application, the applicant is requesting the Board to direct a further vote in which the bargaining rights of Local 353 would again be placed in issue a very short time after Local 353 acquired those bargaining rights by means of a representation vote. It appears to us that parties are entitled to a reasonable period of stability after a representation issue has been decided by a vote.

21. The fact the Board does not have the power to refuse to entertain the termination application but for the dismissal of the Association's certification application is not determinative. It appears to us that it is in those situations where bargaining rights are contested that there is the greatest need to ensure a period of stability and continuity for the collective bargaining relationship. Where there is a competition for bargaining rights which usually means that bargaining rights are obtained by a representation vote, the considerable disruption which can occur among the employees requires, where possible, a cooling off period.

22. The circumstances of this case are quite unique. One would not normally expect a termination application to be filed so closely upon the heels of a certificate. As well, one would not expect parties to be in or close to an open period at the time of certification. In the exercise of our discretion under section 103(2)(i) of the Act on the facts before us and in balancing the request of some employees to dispose of their bargaining agent with the desirability of allowing the employer, the trade union and the employees who are parties to the collective bargaining relationship a

period of stability and continuity in that relationship, the Board is of the opinion that it should refuse to entertain this application insofar as it relates to the ICI and residential sectors of the construction industry. With respect to all other sectors of the construction industry, the application cannot proceed since it is clearly untimely.

23. Accordingly, the application is dismissed.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN;

1. In agreeing with my colleagues I do not mean to imply that I question the assertion of the applicant, Mr. Kunkel, that a vote held today might not result in a very different outcome than that which resulted from the larger constituency on April 2nd or that either would not be reflective of the true wishes of those respective constituencies.

2. The question before the Board is whether a *second* test of wishes of employees should be taken based on an application made within a few weeks after the union had won a three-way vote. The answer, I think, must be in the negative.

3. Counsel for the respondent union asserted that he could see no useful industrial relations purpose being served by such a vote. I agree and would add that to grant a vote would be harmful in the long term to unions, employers and employees alike.

4. The fixed term agreement is unique to North American industrial relations systems. It reflects the reality that, whatever the employer gives at the bargaining table, in return the union has nothing to offer other than the prospect for the employer to be able to predetermine certain costs for the period of the agreement.

5. If, as the applicant seems to be arguing in this case, the effect of a majority exercising their statutory right is to price their employer out of the market-place and themselves out of jobs such an unfortunate outcome for both the company and its employees is in the nature of a self-inflicted wound. However, it is not a problem the Board should or can attempt to resolve through granting a second vote only because of the fortuitous position the applicants find themselves in by virtue of the first vote and decision having issued in time to allow the applicants to file a petition for termination of bargaining rights within the open period of the province-wide agreement.

6. The concept of an open period during which bargaining rights can be tested is a necessary concomitant to the fixed-term agreement and in combination they allow all three parties to function in an aura of certainty. To allow one party a second or third opportunity to re-test the issue of bargaining rights during the open period would be as damaging, in my view, as to allow one party to make alterations to the terms of the agreement during its currency.

7. For these reasons, although it was filed during the open period, I would not find the application to be "timely".

0385-85-U Robert Robinson, Complainant, v. Toronto Printing Pressman and Assistants' Union No. 10, Respondent, v. Ronalds Printing, Richmond Hill, Intervener

Duty of Fair Representation - Evidence - Unfair Labour Practice - Union not referring discharge grievance to arbitration - Union not calling any evidence at hearing - Employee's discharge grievance so lacking in merit that no explanation of its decision not to go to arbitration required of the union - Onus of proof in s. 68 complaint discussed

BEFORE: *Owen V. Gray*, Vice-Chairman.

APPEARANCES: *E. G. Posen* for the complainant; *Chris G. Paliare* and *Bill Hall* for the respondent; *Graeme Simpson* for the intervener.

DECISION OF THE BOARD; July 22, 1986

1. On January 31, 1985, Robert Robinson was dismissed by his employer of 12 years, Ronald's Printing. Pursuant to the terms of its collective agreement with that employer, the respondent trade union filed a grievance of the discharge on Robinson's behalf. The grievance was considered by a grievance committee consisting of two union and two company representatives. After hearing the grievor and others, the committee by unanimous decision rejected the grievance. The union did not refer the grievance to arbitration. Robinson's complaint in these proceedings is that the union's failure to refer his grievance to arbitration was a violation of section 68 of the *Labour Relations Act*, which provides:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The following facts were agreed to by the parties at the beginning of the Board's hearing of this complaint:

- a) The complainant Robert Robinson began working at Ronald's Printing on January 17, 1973.
- b) In November or December, 1980, the complainant was registered in the Apprentice Pressman program. As an Apprentice Pressman the complainant was under an obligation to pursue his course of instruction. The course of instruction includes a number of Lessons that must be written.
- c) By the fall of 1983, the complainant had failed to write any of the Lessons required for his Apprenticeship.
- d) The complainant was removed from the Apprenticeship program in November 1983.
- e) The complainant's employment record indicates that between April 7, 1982 and December 1982 he was given four written disciplinary warnings and a one week suspension.
- f) On October 31, 1983 the complainant was terminated for alleged insub-

ordination. The Respondent Union filed a grievance on his behalf and the termination was reduced to a three week suspension.

- g) On November 20, 1984 the complainant received a written warning for allowing an ink fountain to overflow for which he was responsible.
- h) On December 12, 1984 the complainant received a one week suspension for again allowing an ink fountain to overflow.
- i) On January 23, 1985 the complainant again allowed an ink fountain to overflow. At that time he was indefinitely suspended pending a final decision on the appropriate discipline by management.
- j) On January 24, 1985 the complainant met with members of management to discuss the ink fountain incident of January 23, 1985. It was decided at that meeting that the parties would hold a further meeting on January 31, 1985 at which time there would be a decision on what disciplinary action would be taken. In the meantime, the complainant was told to and did take one week of his vacation.
- k) On January 31, 1985 the complainant met with representatives from the company. It was decided at that meeting that the complainant would no longer be employed by the company, however he would be provided with a letter of reference, severance and vacation pay.
- l) On February 7, 1985 the Respondent union filed a grievance on behalf of the complainant alleging that he was discharged without cause.
- m) Pursuant to Article 12 of the collective agreement between the Union and the company, a Grievance Committee was constituted to consider the grievance. The Grievance Committee was composed of two union officials and two company officials.
- n) On February 21, 1985 the Grievance Committee interviewed witnesses and heard representations from the complainant and the company concerning the incident of January 23, 1985.
- o) On February 26, 1985, the Grievance Committee convened a second hearing to deal with certain contradictory statements arising from the meeting of February 21, 1985 and to clarify the issues.
- p) The second meeting of the Grievance Committee was held at 3:00 p.m. on February 26, 1985. Again the Committee interviewed witnesses and heard representations from the complainant and the company.
- q) After hearing the evidence and representations from the parties, the Grievance Committee unanimously supported the actions of the company. Further, the Union representatives requested that the company give the complainant eight weeks severance pay in recognition of his twelve years service. The company agreed to this request.

3. Article 12.04 of the collective agreement provides:

- 12.04 In the event that an employee claims that he has been unjustly discharged, he may present a grievance, which shall be in writing through the Union, within three (3) working days of such discharge. The processing of such grievance shall commence at Step 3 of this Article.

Article 12 of the collective agreement describes the third and subsequent step of the grievance procedure as follows:

12.01

- Step 3 If the Superintendent's decision, which shall be in writing, is not satisfactory, the dispute may, within one (1) working day of the receipt of such decision, be appealed in writing by the employee(s) to a Grievance Committee consisting of two representatives of the Employer and two representatives of the Union. This Grievance Committee shall, within five (5) working days, attempt to resolve the dispute before it. No person directly concerned in the decision referred to in Steps 1 & 2 shall serve as a member of the Grievance Committee.
- Step 4 If the dispute is not resolved by the Grievance Committee within five (5) working days called for in Step 3, the dispute may, within seven (7) working days thereafter, be submitted to arbitration. All decisions made at this step shall be in written form.

4. In his opening statement of the theory of his case, the complainant's counsel stated that while the grievance committee had relied on the culminating incident of January 23rd and the complainant's previous discipline record in coming to its decision, the union's decision not to go to arbitration violated section 68 in three respects. The first was that by virtue of the process followed, the employer had had input into the union's determination whether the grievance would go to arbitration. The second was that in making that determination, the union relied on the complainant's failure to complete the apprenticeship program, a matter which was irrelevant to his discipline record and should not have affected the quality of representation he should have received. The third respect in which section 68 had been violated was that in making its decision, the union considered the fact that in earlier internal union proceedings the complainant had successfully complained about the behaviour of other union members. Having thus set the stage, counsel called the complainant as his sole witness.

5. With respect to the apprenticeship program, Robinson stated that he received his first two lessons in 1982. He acknowledged that an apprentice is obliged to complete lessons without undue delay and that he had received a letter of October 6, 1983 from the union, which administers the apprenticeship program, stating that if those lessons were not in the union office by November 7, 1983, he would be removed from the course and lose his status as apprentice. Although he claimed he had completed the lessons by October 31, 1983, he admitted they were never handed in to the union. He was terminated for alleged insubordination on October 31st and learned by telegram on November 22nd that he could return to work on November 24th. After his return to work, he spoke to Gordon Churchill, the union officer who deals with the apprenticeship program, about a further extension of the deadline for handing in his lessons. Churchill told him it was too late and there was nothing that could then be done.

6. Robinson conceded that he had been at the union office on November 1, 1983, to discuss grieving his October 31st discharge with Bill Hall, the union's President, and did not then hand in his lessons or tell either Hall or Churchill that he had completed them. He further conceded that he had known on his return to work that he was returning as an assistant pressman and

not as an apprentice, but denied this was one of the terms of the settlement by which he was reinstated at that time. Indeed, he denied that he knew of or had approved the terms of that settlement before his return to work. In his evidence in chief he said he had not agreed to a suspension without pay. In cross-examination he rejected the suggestion that while the union told him it would go to arbitration for him, he had decided to accept the settlement because he needed money and could not wait for the arbitration hearing. In re-examination he said the union had consulted with him "slightly" about the terms of settlement before he returned to work, and observed that the three week suspension "made me furious - I had no money - I was forced to take that." He testified that he had "tried" to bring a complaint about this demotion to the attention of the union and the company but, apart from vague claims to have spoken to people, the only action he could identify in this regard was a handwritten note he handed to the union in November 1984, a year later.

7. At some point after his October 1983 termination, Robinson complained to the union about the behaviour of three union members in the bargaining unit whose reports to management had resulted in that termination. The union dealt with the complaint, upheld it and reprimanded the persons Robinson had accused.

8. With reference to the ink spill reprimand of November 20, 1984, Robinson says that ink spill occurred while he was away from his station dealing with a web break which he claims would have caused downtime if he had not responded to it. He says it only took a few minutes for him to clean up the spill, and there was no lost production. The parties having agreed at the outset that the November 20th spill had resulted in a written reprimand and not (as the union had initially pleaded) a suspension, Robinson's counsel asked him whether he had been suspended for this incident. He answered "yes." Asked if he served the suspension, he again answered "yes." He said he did not talk to the union about that discipline because he figured it would not be taken care of.

9. Robinson testified that the December 1984 ink spill occurred because the device used to turn the ink flow on and off was not in proper working order. He also said he did not report this problem because that was not his responsibility. He stated that it only took a few minutes for him to clean up the spill, and there was no lost production. His counsel asked him if he had done anything about the suspension he received on this occasion, and he answered "no" -- he figured it was not going to be taken care of. His counsel asked him if he had filed a grievance. He said "no". His counsel then showed him this letter on the letterhead of Ronald's:

December 24, 1984

TO: Bob Robinson

RE: *Your Grievance*

In future, please submit grievances on the proper form available. Your suspension was the result of neglect of duty and so is fair. The other two employees who did what you did received verbal warnings, just as you have in the past. This is therefore not discriminatory action.

Your claims regarding apprenticeships and rates should be dealt with through the Union office.

Colin Major

Press Superintendent

His counsel again asked Robinson whether he had filed a grievance. Robinson again said "no", but this time added that "I let the chapel chairman know I wanted to do something." In response to further questions in chief, he said he had not spoken to Colin Major about his suspension and did not know what he was referring to in his letter. During cross-examination, Robinson said he had

“told” the chapel chairman about this grievance, but had not contacted Hall to say that he wanted to file a grievance.

10. On the second day of hearing (some months after the first day), Robinson testified for the first time that the chapel chairman had told him he could not do anything about the suspension in December, and that he had complained about this conduct of the chapel chairman “many times” since, although this complaint had not been set out in his counsel’s subsequent correspondence with the union, nor in the Complaint which initiated these proceedings. At the time of the December spill, Robinson wrote this comment on the notice of discipline prepared by management: “These comments are not true to the facts above.” Asked in re-examination which comments were untrue, Robinson pointed to the statement “... your lack of attention on the job caused you to let fountains overflow” and said that the fountains did not really overflow -- the ink just came up to the top of the fountain and “flowed out very slightly.”

11. Robinson explained that the ink spill of January 23, 1985, occurred while he was away from his station for three or four minutes delivering material to the proofreader at the request of the employee who would ordinarily deliver such material. He said it only took a few minutes for him to clean up the spill, and there was no lost production.

12. Robinson had some difficulty remembering details of the meetings of January 24th and 31st referred to in paragraphs (j) and (k) of the agreed facts set out in paragraph 2 above. When he testified in chief, his first recollection was that he was dismissed by Colin Major on January 24th, and had then met with Bill Hall at the union office to discuss filing a grievance. It was then drawn out of him that on the 24th he had a meeting with Graeme Simpson (a management employee in charge of human resources), Jim McKinley (one of two chapel chairman) and Colin Major, whom Robinson said had been there for only a brief moment. He also recalled a meeting with the same persons on January 31st, after which the company told him he was terminated. He then went off to see Hall about filing a grievance. He recalled a subsequent meeting on February 21st with Hall, Rolie Eadie (another chapel chairman), and two members of management: Mr. Fox and Mr. Pike. He said that his termination was discussed at that meeting, and he was again told he was terminated. He remembered that at one point Hall stepped out of the meeting to discuss with him whether his grievance would go to arbitration, and Hall told him he would not take it to the members because he had nothing to go on.

13. In chief, Robinson said he had not attended any meeting after February 21st. In cross-examination he acknowledged that there had been another meeting with the same people on February 26th, which had been called at Hall’s request to deal with conflicting stories the committee had heard in the first meeting. In both meetings, Robinson conceded, he had had an opportunity to tell his story. In this second meeting, he had been present when the other witnesses told their stories and had had an opportunity to contradict them. With respect to his claim that the spills were the fault of the equipment, Robinson said he had shown McKinley and Eadie what he was talking about at some point before or during the grievance committee process. He admitted that other workers used the same equipment and that he could not name anyone who had had three spills in three months.

14. When the hearing of this complaint began, counsel for the union filed a number of documents with the Board in the apparent expectation that they would become exhibits in the course of the hearing. Some became exhibits during Robinson’s testimony, although not often as evidence of the truth of their contents, and others did not. Many of the questions union counsel asked Robinson in cross-examination were in the form of assertions of fact not yet in evidence with which the witness was invited to agree. For the most part, he disagreed. Counsel’s approach left the impres-

sion (as it was no doubt designed to do) that his assertions represented the evidence which could be given by union witnesses. Indeed, this impression was reinforced by the use of phrases like "our evidence will be that ..." in the framing of at least two questions in cross-examination. These matters are noteworthy only because counsel for the union called no evidence when the complainant's case concluded. Counsel for the complainant did not argue that, by cross-examining in the manner I have described, counsel for the union had implicitly undertaken to call some evidence, and I express no opinion on the likelihood of success of such an argument. I do observe that, in disposing of this complaint, I have been obliged to disregard and have disregarded the contents of questions asked and documents filed by counsel for the union except to the extent that the complainant acknowledged their accuracy. For anyone better informed than I of the actual reasons for the decisions of the grievance committee and the union, this may explain any failure in what follows to address all the matters with which they may actually have dealt.

15. In argument, counsel for the complainant did not directly address his opening point that section 68 was violated when the employer had "input" into the union's determination whether to take Robinson's grievance to arbitration. Perhaps this is because the only employer input discernable from the evidence is of the expected sort. The grievance committee's hearings and deliberations would have given the employer the opportunity to put before the union representatives on the committee the evidence and arguments it would put before an arbitrator if the matter proceeded further, and the union representatives may well have taken those matters into account in assessing the merits of the grievance -- a question of major importance in deciding whether to take the grievance to arbitration. To that extent, the employer would undoubtedly have had input into that decision and thence, to the extent it was based on the result of the committee hearings, on the union's decision not to go to arbitration. There is nothing sinister about that. One of the major objects of any grievance procedure is to promote settlement of differences, and this object is advanced by a full and frank disclosure by each party to the other of the strengths and weaknesses of its case. The mere fact that union decision makers participate in discussions with the employer of the merits of a grievance does not constitute a violation of the union's section 68 duty to the grievor.

16. The company's minutes of the meeting of January 31, 1985, contain this passage:

Looking at it from his point of view and into the future, it was agreed that even if Bob's performance improved drastically, historical stigmas attached to his relationships with the other 170 odd Press Department employees would be detrimental to his future.

Jim added that even if Bob became President of the Company, his credibility and respect would not allow him success.

"Jim" is Jim McKinley, the chapel chairman who was at the meeting to represent Robinson. While he took issue with the accuracy of the minutes in other respects, Robinson said the second of the above-quoted paragraphs accurately records something Jim McKinley did say on that occasion. Robinson's counsel submitted that in saying what is recorded there, McKinley was cutting the pins out from under Robinson. He pointed to this and Robinson's statement that a chapel chairman told him nothing could be done about the December suspension as evidence that the union was not interested in representing him.

17. The question of McKinley's having made this statement first arose in re-examination. Robinson challenged neither the accuracy of McKinley's observation nor its relevance to the matters under discussion at the time, nor did *he* ever suggest, then or earlier, that McKinley had not been even-handed or fair in presenting the strengths and weaknesses of his position at the meeting. In the absence of any such challenge or suggestion, the mere fact that McKinley made this state-

ment in the course of a meeting with management does not constitute a violation of section 68, nor does it support an inference that one may have occurred at some other time.

18. Robinson's evidence that a chapel chairman told him nothing could be done about his December suspension would be most troubling - if I believed it. I do not. Robinson was a highly unbelievable witness. He did not impress me as frank and forthright. Even in answering his own counsel's questions he was often vague, unresponsive and inconsistent. He appeared to suffer both from the influence of self-interest and an inability to sense what best served his interest. On most matters his recollection was far weaker than could ordinarily be accounted for by the passage of time since the events in question. Even though his evidence was uncontradicted by any other witness, I found it hard to believe him in controversial matters. In the matter of the union's response to his December suspension, I believe his first statement in chief that he did not approach the union at all, and disbelieve his later suggestions that he had sought the assistance of or been led astray by a chapel chairman.

19. There having been no evidence that the union took inappropriate matters into account in deciding not to take Robinson's grievance to arbitration, his counsel submitted that this complaint ought to succeed because there was no evidence at all of the basis on which the union made that decision or of the considerations it actually did or did not take into account. Having been obliged to ignore the explanatory features of the questions union counsel asked in cross-examination and the documents he filed but did not prove, I have given this argument very serious consideration.

20. In *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, 5 Can. LRBR (NS) 108, the Board made these observations:

40. Discharge is the ultimate sanction in collective bargaining. Through it an employee forfeits not only his livelihood but also valuable accrued rights including seniority and benefits, acquired sometimes over years of service. For this reason the law in some jurisdictions gives discharged employees an absolute right to have their terminations reviewed at arbitration. (See Division V. 7 Unjust Dismissal) Section 61.5 of the *Canada Labour Code*, R.S.C. 1970, C. L-1, amended S.C. 1977-78, C.27, applicable to employees not covered by a collective agreement). Some maintain that the duty of fair representation should be interpreted as requiring a union to carry the grievance of any discharged employee to arbitration (see Weiler, P., *Reconcilable Differences*, (1980) pp. 137ff.) In *Brenda Haley* [1980] 3 Can. LRBR 501; (1980), 41 di 295, [1981] 2 Can. LRBR 121; 41 di 311 (Plenary Board Review), however, the Canada Labour Relations Board declined to adopt Professor Weiler's view.

41. This Board does not view the language of section 68 of the Act as guaranteeing to every employee the arbitration of his or her discharge. That is not to say, however, that the duty of fair representation contemplated under section 68 of the Act is unable to remain responsive of labour relations realities.

46. ... In our view, however, the law has evolved beyond the point where the union may simply assert that it has "considered" an employee's request for help and "decided" not to help him.

47. The decision not to process a grievance for an employee who has been disciplined or discharged may, depending on the circumstances, be a justified and responsible exercise of a union's prerogatives. Where, however, an employee has been discharged there is an obligation on a union to provide a satisfactory explanation for its decision not to process a grievance. *While the legal burden in a section 68 complaint is on the individual complainant, once it is established that a union member has suffered the ultimate sanction on discharge, this Board expects a persuasive account from the union to justify its refusal to file a grievance, or having done so, to carry the grievance to arbitration.*

[emphasis added]

While I adopt the words quoted, I do not understand the emphasized passage to require in every case that a respondent trade union answer evidence of the complainant's having been discharged by calling any or any particular witness of its own. The need to do so will arise only if, as one would normally expect, the balance of the complainant's evidence does not adequately explain the union's decision.

21. In *Boise Cascade Ltd.*, [1982] OLRB Rep. July 981, the respondent IBEW called no evidence in answer to a complaint that it did not support the complainant's claim to a job for which he had applied and been rejected. There, the Board made these observations about onus, both generally and in the case before it:

15. The final onus of proving a violation of the Act rests with the complainant. The complainant led no positive evidence to establish that the IBEW acted in a manner that was arbitrary, discriminatory or in bad faith. The complainant established only that he asked the IBEW for assistance and that such assistance was not forthcoming. In our view, *the testimony of a complainant to the effect that he asked his union for assistance and the union refused, may in certain circumstances be sufficient to establish a prima facie case of a breach of section 68 such as to place an evidentiary onus on the trade union to establish that its decision making process did not violate section 68. An example of this might be a situation where an employee requested the union's assistance with what appeared to be a meritorious grievance of some importance and yet the union failed to take any action. In such a situation, lacking any evidence from the trade as to why it failed to act, one might reasonably infer that the trade union either acted arbitrarily by failing to properly put its mind to the matter, or if it did do so its decision was motivated by bad faith or discriminatory considerations.* We do not believe, however, that the complainant's case fits within this category. The facts before us, and in particular the evidence relating to the complainant's performance of the spare power house operator's job, indicates that the grievor had a relatively weak claim to the permanent position. Further, it is evident that the IBEW was aware of the problems related to the complainant's performance of the spare power house operator's job. The IBEW attended at meetings with the company called by the UPIU to discuss the complainant's case. When all of these considerations are taken into account we cannot conclude on the balance of probabilities that the IBEW's decision not to help the complainant was due to improper considerations, or an arbitrary failure to consider the matter at all, as opposed to the union considering the matter and concluding that the complainant's claim to the permanent power house operator's job was lacking in merit. This being the case, we are of the view that an evidentiary onus never did shift to the IBEW so as to require that it come forward to demonstrate that it did not violate section 68 of the Act.

[emphasis added]

In my view, the emphasized passage is consistent with and may serve as an explanation of the last sentence of the passage I have quoted from *Swing Stage Ltd.*, *supra*.

22. Nothing in the evidence of their past dealings gives me concern that the union was pre-disposed to treat the complainant with indifference or hostility. It was not argued that the union failed to ascertain the complainant's version of matters relevant to an assessment of the merits of his grievance or otherwise failed to adequately investigate the grievance. The evidence makes it clear that the complainant had a full opportunity to present his case and answer the case made against him before the grievance committee. There is no evidence that the complainant requested and was denied an explanation for the union's decision not to proceed to arbitration. Indeed, that matter was discussed with him by Hall. Standing alone, the explanation Robinson remembers Hall giving -- that he had "nothing to go on" -- is so vague as to be uninformative. There is no evidence that Robinson sought any clearer explanation at that point, however, and it is entirely possible that the vagueness is not in what Hall said but in how Robinson remembers it.

23. In this context, having carefully considered Mr. Robinson's evidence and the manner in which he gave it, I have concluded that his discharge grievance was so lacking in merit that no fur-

ther explanation of its decision not to refer that grievance to arbitration is required of the respondent in this case. Three considerations lead me to the conclusion that Robinson's grievance was devoid of any real merit. First, having heard him give it, I do not think there was much likelihood that Robinson's exculpatory explanation for the culminating incident of January 23, 1985 would have been believed, and I have no reason to suppose he would have inspired any greater confidence in the union representatives on the grievance committee when he appeared before it. Second, this is not a case in which there has been any obvious departure from the principle of progressive discipline, which was described in this way in *Swing Stage Ltd.*, *supra*, at paragraph 38:

38. The collective bargaining system and much of the jurisprudence arising out of it, generally accepts the principle of progressive discipline. An employee is normally warned in writing, sometimes more than once when his work performance or his conduct falls below an acceptable standard. A continuation of the substandard conduct may lead to one or more suspensions. Beyond that point, a failure to correct the problem may well provide just cause for the employee's termination. Egregious conduct may in some cases justify a departure from this normal pattern of progressive discipline. Generally, however, an employee may expect to be given adequate warning respecting his conduct or performance before being confronted with the ultimate sanction of discharge. Moreover, an arbitrator may be expected to review with care a discharge which departs from the normal stream of progressive discipline....

The fact that, as I find, Robinson did not ask the union to grieve the December suspension lends this second point its considerable weight. Third, I recognize that even with two prior incidents, the second resulting in an unchallenged one week suspension, there is the possibility that an arbitrator might substitute for discharge some lesser discipline in response to an argument that three puddles of ink should not cost this worker his job. While such a result can never be described as impossible, Robinson's demeanor makes it highly improbable in this case. I had no sense that he felt he had ever done anything wrong. He gave the clear impression that he regarded everything bad that happened to him as the fault of some other person or thing. He had not responded to the earlier discipline. I think it highly unlikely that an arbitrator or arbitration board would have concluded that Robinson might respond positively to being given one last chance.

24. I am unable to find the union acted in a manner which was arbitrary, discriminatory or in bad faith in its representation of the complainant. Accordingly, this complaint is dismissed.

0359-86-R Employees of Sears Canada Inc. (Peterborough), Applicant, v. Retail, Wholesale & Department Store Union, Respondent, v. **Sears Canada Inc.**, Intervener

Collective Agreement - Termination - Timeliness - Collective agreement ratified but not signed formally by union due to discovery of typographical errors - Whether collective agreement in existence to bar termination application

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and R. R. Montague.

APPEARANCES: Maureen L. Day, Richard H. Steuernol, William E. Martell and Merrell Morrissey for the applicant; Elizabeth J. Shilton Lennon, Frank Richards and Donna Johansen for the res-

pondent; C. G. Riggs,, Nancy A. Eber, Kenneth M. Eady, D. Ernst and R. Hanson for the intervenor.

DECISION OF THE BOARD; August 7, 1986

I

1. The name of the respondent is amended to read: "Retail, Wholesale & Department Store Union".

2. This is an application for termination of the respondent union's bargaining rights, made pursuant to section 57(1) of the *Labour Relations Act*. The application was filed on April 16, 1986. A hearing was held, in Toronto, on June 25, 1986. At that hearing, the union contended that this application was untimely because there was a collective agreement in effect at the time it was made. The applicants submitted that they were unaware of any subsisting collective agreement. The employer took no position - leaving it for the Board to determine whether the facts establish the existence of a collective agreement which would bar the present application. Except as noted below, the facts are not in dispute.

3. On April 16, 1985, the union was certified to represent a unit of the employer's retail employees working in Peterborough. Thereafter the union and the employer engaged in a protracted set of negotiations with a view to concluding a first collective agreement. A conciliation officer was appointed to assist them, and on November 8, 1985, the Minister of Labour advised the parties that he did not consider it appropriate to appoint a conciliation board. The parties requested further mediation and on December 5, 1985, they reached a "memorandum of agreement" which is styled and framed as follows:

MEMORANDUM OF AGREEMENT

Between:

Sears Canada Inc.

("Company")

and

Retail, Wholesale and Department
Store Union AFL.CIO.CLC

("Union")

1. The representatives of the parties unanimously agree to recommend to their principals acceptance of the following terms of settlement for a collective agreement.

2. The collective agreement shall be in the form of the document attached hereto and marked as Schedule "A".

Dated at Peterborough this 5th day of December, 1985.

For the Company
"K. M. Eady"

For the Union
"James R. McKenzie"

4. The "Schedule 'A'" mentioned in the memorandum of agreement, in fact, takes the form of a complete collective agreement with a cover page, index, and 57 pages of numbered articles and related appendices, setting out in considerable detail the agreed terms and conditions of employment. At various points, the typed version has been amended by handwritten additions,

including at Article 38.01 which provides that the agreement is to be "in full force and effect from the 5th day of December, 1985 until the 5th day of December 1987...". The cover page of "Schedule 'A'" is framed as follows:

THIS AGREEMENT made and entered into as of the 5 day of December, 1985.

B E T W E E N:

SEARS CANADA INC.

(hereinafter referred
to as the "Company")

- and -

RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION, AFL:CIO:CLC

(hereinafter referred
to as the "Union")

5. The memorandum of agreement contemplates formal ratification by both parties. On December 8, 1985, the union held a meeting and the bargaining unit members voted to ratify the agreement. That result was communicated to the company orally by telephone on the same day. Two days later, the union wrote to the company to identify its "acting" stewards: union representatives contemplated by Article 5 of the agreement, who have a role to play in processing grievances in the manner prescribed in Article 6. The union indicated that it would be impossible to hold steward elections until the new year. On December 20, 1985, the company wrote to the union attaching a copy of what is described as "the collective agreement" and suggesting various January dates to sign it, in Peterborough. January 7th was arranged, but the meeting had to be cancelled because of inclement weather. That same day the union wrote to the company outlining the amount of union dues to be deducted and the address to which such funds should be sent. In a separate letter, the union suggested the 15th of January as an agreeable signing date. Apparently, this did not occur, but on January 23, 1986, a union representative wrote to the company pointing out certain typographical or transcription errors.

6. The election of stewards and the establishment of a formal mechanism for processing grievances was in fact completed late in January. Certain grievances were filed and processed through at least the preliminary stages *prior* to the filing of the termination application. Thereafter, grievances have continued through the process, but with the express caveat that this was being done as a matter of courtesy, and entirely without prejudice to the issues raised in this application. For the same reason, the employer has refused to implement the negotiated wage increase which would ordinarily come into effect on May 1, 1986. Union dues have never been deducted because of some interpretation question (not explained) which apparently was the subject of a grievance which crystallized prior to this application.

7. On or about February 27, 1986, the company wrote to the union enclosing copies of the collective agreement signed by it, and requesting the return of two copies signed by the union representatives. Subsequently, in a meeting where the document was to be formally signed by the union representatives, an employee drew the union's attention to what was believed to be an error in the schedule listing the commission rates for commission sales personnel. That schedule establishes a "grid" with quite a variety of commission rates, depending upon the employee's department and job category. The union was of the view that the rate for inside sales personnel selling vacuum cleaners should be ten per cent (the same as for sewing machines) rather than the six per cent appearing in the document. The document was not returned to the company with signatures

on it because of this outstanding question and there was apparently some considerable discussion with the company about the matter. Eventually, on April 22, 1986 (*after* the union would have been aware of the present application), the union wrote to the company to indicate that it was prepared to sign the agreement with the six per cent rate included, notwithstanding its position that the rate was in error, did not reflect the "current commission" as the agreement requires, and that the "Law would prevent the Company from refusing the ten per cent rate now in effect". In summary then, the union was prepared to sign the document but was continuing to assert that there was an error in this one respect because the stated figure did not in fact reflect the "current" commission rates as the schedule was supposed to do. On the facts before us, we cannot determine the accuracy of the memorandum of settlement which was ratified and the later document based on the attached "Schedule 'A'" both contain an error, nor can we determine precisely when the union officials added their signatures to those of the company.

8. Finally, we might note that despite the parties' disagreement about the alleged "mistake" appearing in the schedule of commissions, and the dispute about how the union dues provision should be applied, neither of the bargaining parties raised any question or challenge to the existence of a binding collective agreement between them. No such suggestion or "cloud of doubt" arose until *after* the employer received notice of this termination application. For example, there is no evidence that the employer did not intend to implement the negotiated wage increase scheduled to take effect in May 1986, nor is there any evidence that prior to this application the employer ever asserted that there was no collective agreement or indicated that, for that reason, union grievances would not be arbitrable. Certainly no steps were taken to invoke further mediation and there was no suggestion that, there being no collective agreement, the employees could strike or the employer could lock them out.

II

9. The question then, is whether the circumstances here establish the existence of a collective agreement which both binds the bargaining parties and precludes the present application. This is not a novel problem. Although the *Labour Relations Act* requires that a collective agreement be in writing, so that oral undertakings may not be enforceable, this Board and boards of arbitration have frequently been required to determine whether or when a collective agreement has come into effect. One of the most recent cases is *Re Canteen of Canada Ltd. and Retail, Wholesale and Department Store Union, Local 414* (1984), 15 L.A.C. (3d) 305, where Arbitrator M. G. Mitchnick reviewed the practical and policy considerations which, in his view, should bear upon the issue. His analysis is based, in large measure, on an earlier decision of this Board, and is set out in a long passage to which we might usefully refer:

Labour and arbitration boards have long held that the existence of a collective agreement is not dependent upon the execution of a formal document, which traditionally occurs a good deal later than the successful conclusion of negotiations. Because of what rides on it in terms of the tabling of new positions or resort to economic sanctions, what tribunals have always required is a certainty that the bargaining has been brought to an end, as well as sufficient documentation of the settlement that its precise terms can be identified and interpreted by a third party, if necessary. As the Ontario Labour Relations Board stated in *U.E.W. v. Marsland Engineering Ltd.*, [1970] O.L.R.B. Rep. 133 (O'Shea) at p. 138, para. 13 for example:

...until such time as the parties complete their negotiations by resolving all outstanding issues and bring their bargaining to an end, it cannot be said that a collective agreement has been consummated.

The important thing is that the parties know when their negotiations are complete, and the simplest indication for an adjudicator that that has occurred is a clear statement to that effect signed by each of the parties. Experience has shown, however, that negotiations are not always concluded in quite such a model form, and labour tribunals have had to take care to respond to the

realities of how collective bargaining takes place. This is the thrust of the remarks of the Ontario Labour Relations Board once again, for example, in *Graphic Arts Int'l Union, Local 12-L v. Graphic Centre (Ontario) Inc.*, 76 C.L.L.C. para. 16,041, [1976] O.L.R.B. Rep. 221 (Burkett).

...

The collective agreement is the cornerstone of our labour relations system. It evidences the existence of bargaining rights and other than during a stipulated period serves as a bar to either the termination or transfer of these rights. It evidences a bargain struck between the parties as to term and conditions of employment for a term specific and requires that any dispute as to its interpretation, application or administration be resolved by binding arbitration. Its existence or lack thereof can be determinative of the legality or illegality of certain activities engaged in by an employer, a trade union or by employees. The Board in lending an interpretation to section 1(1)(e) has been influenced by both the realities of the collective bargaining process and by the practical need for consistent and easily understood criteria. The parties to collective bargaining do not normally execute a formal document until some time after the bargaining process has been completed. The process is one wherein the agreement of the parties is reduced to a memorandum of settlement subject to ratification by the respective principals which is then followed by the drafting and execution of the formal document. It would not be sound industrial relations policy to require as a condition of entering into a collective agreement the execution of the formal document thereby precipitating an often prolonged extension of the open period. The parties, however, must know, with a high degree of certainty and predictability, precisely when they have entered into a collective agreement so as they may properly assume their respective duties and responsibilities and conduct themselves in a manner consistent with the existence of a subsisting collective agreement.

Normally, the last step in the collective bargaining process is employee ratification, and tribunals have initially held that this pre-condition of a settlement must be evidenced in writing before a collective agreement can be said to have been unequivocally achieved. But that requirement quickly led to results that were unrealistic and unwarranted, and room had to be made for a more flexible approach, although carefully reserved for appropriate cases. The *Graphic Centre* case, once again, expanded on this point as follows [pp. 616-7 C.L.L.C.]:

13. In a number of cases the Board has been faced with situations where the parties have signed a memorandum of settlement subsequent to which confusion has arisen as to whether ratification has occurred. In certain of these situations the Board has responded to the extrinsic evidence and drawn the inference that ratification has occurred without their being signed evidence of this fact. (See *Versa Services Limited* case [1972] OLRB Rep. Apr. 306, *Service Employees Union Local 210* case *supra*, *Field-Price Limited* case [1973] OLRB Rep. Oct. 543.) In other similar situations however the Board has stated that the parties must signify their ratification of the memorandum in writing (see *Marsland Engineering Limited* case *supra*, *Civil Service Association of Ontario* case [1971] OLRB Rep. Sept. 596) in order for there to be a collective agreement within the meaning of the Act. Although each case must be considered within its own circumstances a signed memorandum of settlement coupled with *compelling* evidence of ratification must be considered by the Board as evidence of a collective agreement within the meaning of the Act. Whereas a Memorandum of Understanding subject to ratification is not a collective agreement (see *John Inglis Co. Ltd.* case [1974] 1 Can. LRBR 481 (B.C.)), evidence which clearly establishes that ratification has occurred elevates the memorandum to the status of a collective agreement within the meaning of the Act. Ratification satisfies the condition precedent thereby giving rise to what is then an unconditional agreement in writing (i.e. signed by the parties) on all outstanding matters. Although signed evidence of ratification is perhaps the most satisfactory evidence in this regard, the Board cannot ignore other evidence which supports the singular inference that ratification has occurred. It should be added that if the Board were to require signed evidence of ratification in all cases it would be denying the parties use of the equitable doctrine of estoppel in those situations where there is evidence of ratification, other than signed

notification which has been relied upon by one or the other of the parties). (See *Garden City Laundry Limited* case [1970] OLRB Rep. May 240.)

I can see no logical reason for rejecting this kind of commonsense approach when what is at issue is not employee ratification but, for example, whether the company, for its part, has unequivocally signified its acceptance of the written terms of settlement. It seems to me that so-called expert labour tribunals inexcusably fail to serve their constituency if they cannot have regard to that kind of reality. This seems particularly so when one considers that the courts, in dealing with the Statute of Frauds, which, as union counsel points out, was passed for the *sole purpose* of requiring certain types of agreements to be in writing, soon developed a principle of finding the contract to exist where "signed writing was lacking but other convincing proof was present": *Cheshire and Fifoot's Law of Contract* 8th ed. (1972) p. 142.

It seems to me that that is precisely what was being done in the labour board's *Versaservices Ltd. v. Canadian Union of General Employees* [1972] O.L.R.B. Rep. 306, (Shime), cited to me by the union. There the company considered that negotiations had been concluded, and sent the union in the usual way unsigned collective agreements in draft for the union's perusal. The signature of the company's industrial relations officer was on the letter accompanying the documents, but no company signature was on the documents themselves, and the case was dealt with as one with an absence of company signature formally accepting the terms of settlement. The board wrote [p. 311]:

We are also of the opinion that the preparation of the collective agreement by Versaservices Limited in accordance with the terms of the Memorandum of Settlement and the forwarding of that collective agreement to the union for signature is sufficient indication in the circumstances of this case that the employer had accepted the terms of the collective agreement pursuant to paragraph 2 of the Memorandum of Settlement.

In *Canteen*, the arbitrator was prepared to find, on the evidence, that there was a collective agreement even though the written document put before him lacked the signature of a company representative. He concluded that signatures (or their absence) were an evidentiary issue not a matter required by section 1(1)(e), and he went on to observe:

In the present case, the proposed terms of settlement now relied upon by the union were the terms proposed by the company itself. They were handed across the bargaining table and were clearly stated to represent the basis on which the company was prepared to settle the contract. The only question left open for the parties at that point was whether the employees would accept it. The employees did in fact accept and the company received from the union unequivocal confirmation in writing that that was the case. All of the terms of settlement had been set out in the document which the company had tabled on February 17th, and nothing remained to be done except formal execution of the so-called "long form" of collective agreement.

Can it really be said that the parties would be in a different legal position today if the company representative, in handing the final offer across the table on February 17th, either directly or through the mediator, had attached a letter signed by himself saying "attached is our final offer", or had happened to scrawl his signature or initials at the bottom of the final offer document itself? I think not. The parties knew that they had a deal on February 28th, when the union advised that the offer was accepted, and they know that they have a deal today....I am satisfied that there presently exists between the parties a collective agreement within the meaning of s. 1(1)(e) of the *Labour Relations Act*. I would only add, to keep the issue in perspective, that I would have come to the same conclusion had the union, subsequent to February 28th, become disenchanted and led the employees out on strike, and had the issue before me then been the lawfulness of that strike.

10. Arbitrator Pamela C. Picher adopted the same approach in *Re Mississauga Hydro Commission and International Brotherhood of Electrical Workers, Local 636* (1984), 17 L.A.C. (3d) 299 (Application for Judicial Review Dismissed, June 21, 1985) where she relied upon both the

Canteen decision and the statements of principle enunciated by this Board in *Graphic Centre*. She too concluded that the execution of a formal agreement following and incorporating an earlier memorandum of settlement, is not a necessary prerequisite to the existence of a collective agreement so long as: 1) the bargaining has been brought to an end, and 2) there is sufficient documentation of the settlement that the exact terms of the agreement can be ascertained and, if required, interpreted by a third party. She noted that a memorandum of agreement, once ratified, was ordinarily regarded as a binding collective agreement even though no subsequent more formal document had been executed [see *Re City of Penticton and CUPE Local 608* (1977), 17 L.A.C. (2d) 316 (Smith), *Jackson and Cope v. Shipping Federation of British Columbia*, (1955) 15 W.W.R. 311, and *Re Alcan Canadian Foils and Printing Specialties and Paper Products Union, Local 466* (1977), 11 L.A.C. (2d) 252 (Schiff)], and cited with approval the following passage from the decision of the British Columbia Labour Relations Board in *Re International Brotherhood of Electrical Workers, Local 213 and John Inglis Co. Ltd.*, [1974] Can.L.R.B.R. 481:

While ordinarily the parties to an ongoing collective bargaining relationship will want to tidy up their agreement, by incorporating all of the recent changes into one new formal document, there is an important policy reason for holding that the earlier signed documents together do constitute a legally effective collective agreement. If they do not, then one has the unfortunate result (as in *Wabi Iron Works* which was relied on here by the Union) that there is no legal framework for adjudicating grievances in the interim. The previous agreement may have been effectively terminated and a lawyer or a printer may be taking considerable time putting the formal collective agreement together. If the memorandum of agreement is not a binding collective agreement in the interim, then an employee who is discharged will have no legal basis for lodging a grievance and going to arbitration. An intention to produce such a result should not be imputed to the parties to a memorandum of settlement worded as clearly as is this one.

In the result, on the evidence before her, Ms. Picher concluded that a memorandum of agreement, once ratified, could constitute a binding collective agreement even in the absence of formal signatures, so long as the circumstances indicated that the written document clearly evidenced an agreement of the parties.

11. We are inclined to accept this general approach which, in our view, is in accordance with the realities of collective bargaining. The fact is that (as in the instant case) hard bargaining and the possible threat of a strike or lockout frequently lead to a document or series of documents (sometimes handwritten, modified or amended at the eleventh hour) which together constitute a final settlement of the matters in dispute. So long as the terms of the settlement do not themselves contemplate further bargaining and both parties purport to ratify the agreed terms of a settlement, we do not think that we should lightly conclude that there is no collective agreement in effect - even though the parties may wish to "tidy things up" by incorporating all changes, amendments, or final agreements on individual issues into a single more formal document. To hold otherwise would encourage parties to resile from written settlements which, at the time, were regarded as a final resolution of their collective bargaining dispute, but may have lacked the form or formalities usually associated with a collective agreement.

12. In the instant case there is a written document in the form of and described by the parties as a "collective agreement". The "memorandum of agreement" incorporating the "collective agreement" document is signed by officials of each of the bargaining parties and represents the conclusion of their negotiations, a settlement of all outstanding matters in dispute together with an undertaking to recommend that settlement to the employer and the employees for ratification. Ratification took place at a union meeting on or about December 8, 1985. The memorandum of settlement does not contemplate further negotiations on any item whatsoever and on December 8, 1985 the ratification was without qualification. This is not a case in which the employees rejected the settlement and sent the union representatives back to the bargaining table to press for changes.

The company was advised of that ratification and subsequently the parties conducted themselves as if the agreement were in effect. Stewards were selected, grievances were filed and processed, and the union advised the company of the amounts to be deducted for union dues and where such monies were to be sent. No one suggested that there was no agreement in effect, or that the employees could not file grievances, or that there should be further negotiations or mediation efforts, or that the employees were entitled to strike or picket the employer's premises. Both parties acted as if there was a binding collective agreement in effect and there is no evidence to suggest that either of them thought otherwise. The so-called "errors and omissions" identified by the trade union were the result of "proofreading the Peterborough store *collective agreement*" and there is no evidence that any of them except the vacuum cleaner salesmen commission rate were of any real significance. Even that issue was one which arose at least three months after the settlement was ratified. Again, this is not a case in which the settlement was rejected, or ratification delayed, because employees were concerned about the commission rate stipulated for vacuum cleaner salesmen. The proposed agreement was ratified on December 8, 1985. The alleged mistake in the schedule of commission rates was discovered much later.

13. Does the discovery of what the union considered a "mistake" in the commission rate schedule vitiate the earlier ratification of the agreement, *including that rate*, or mean that there has never been any collective agreement in effect? We do not think so. It may be that the agreement does contain an error or ambiguity if, as a matter of fact, a portion of the agreement purporting to list the "current" commission rates does not accurately do so. However, that is a matter of interpretation of the collective agreement and is ultimately for an arbitrator to resolve. It does not mean that there is no collective agreement at all, for as the Board noted in *PPG Industries Canada Ltd.*, [1986] OLRB Rep. Jan. 143:

7. The Board in previous decisions has dealt with the unique nature of collective agreements and the inapplicability of many areas of contract or common law to the law of collective bargaining under the *Labour Relations Act*. Common law doctrines are apposite only to the extent that they do not conflict with the statutory parameters and underlying principles of labour relations reflected in that legislation. The doctrine of common mistake, for example, like the doctrine of mutual mistake, where it does not go to the root of the agreement, does not operate to vitiate a collective agreement. See: *Sperry Vickers Division Sperry Inc. Canada*, [1983] OLRB Rep. July 1208, *Universal Handling Equipment Company Limited*, [1979] OLRB Rep. April 356; *Re Puretex Knitting Co. Ltd. and Canadian Textile & Chemical Union, Local 560* (1975), 8 L.A.C. (2d) 371 (Dunn); and *Re Hamilton Medical Laboratories and County Medical Laboratory and Ontario Public Service Employees' Union* (1983), 10 L.A.C. (3d) 106 (Springate).

14. For the foregoing reasons, the Board is satisfied that, at the time this application was made, there was a collective agreement in effect between the union and the employer. Accordingly, pursuant to section 57(2) of the *Labour Relations Act*, no application for termination can be made until the last two months of that collective agreement (i.e., until after October 5, 1987). The present application is therefore dismissed.

0580-86-U; 0632-86-U United Steelworkers of America, Complainant, v. **Walter Tool And Die Ltd.**, Respondent; United Steelworkers of America, Complainant, v. Erwin Walter, Respondent

Parties - Unfair Labour Practice - Plant shutdown following filing of certification application - Employees laid off following certification - Statement to employees threatening shutdown - Breach of sections 64, 66 and 70 found - Order made against both company and president and sole shareholder personally

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *J. Wilson* and *C. A. Ballentine*.

APPEARANCES: *Keith Oleksiuk* and *Steve Banks* for the complainant; *Erwin Walter* for the respondents.

DECISION OF THE BOARD; July 29, 1986

1. The name of the corporate respondent is amended to read "Walter Tool And Die Ltd."
2. During the course of the hearing of these matters on July 2, 1986, the Board ordered that the two complaints filed under section 89 of the Act relating to alleged unfair labour practices by the respondents be consolidated.
3. After hearing the evidence and the submissions of the parties the Board issued the following oral decision:

Having heard the evidence, the allegations and the submissions of the parties, the Board finds the respondents and each of them in breach of the Ontario *Labour Relations Act* and specifically sections 64, 66 and 70 thereof and the Board hereby so declares. In addition, the Board orders that the respondents:

- (a) cease and desist from any and all further violations of the Act;
- (b) post copies of the notice to be prepared by the Board, and which shall refer to the rights of workers and obligations of employers and specifically the duty of an employer to bargain in good faith and with the union and make reasonable efforts to achieve a collective agreement, in the usual places and to be delivered by the respondents by regular prepaid first class mail to all persons employed by the respondent as at May 15, 1986;
- (c) grant the complainant reasonable access to the company's premises during working hours for the purposes of holding one meeting with bargaining unit employees;
- (d) pay to each employee who did not request a leave of absence in order to attend at the certification hearing on May 30, 1986 their regular wages for that day;

- (e) forthwith reinstate Earl Devoe to employment and to the position that he held at the time of his layoff on June 15, 1986 with compensation for all lost wages until the date of reinstatement, such compensation to include interest calculated in accordance with the Board's formula;
- (f) forthwith reinstate Mike Leinweber to his employment and to the position that he held at the time of his layoff on June 6, 1986 or to a comparable position if that position is no longer available for just cause, with compensation for lost wages and benefits from the date of layoff to the date of reinstatement, such compensation to include interest calculated in accordance with the Board's formula;
- (g) any compensation to be paid to any person is to be subject to deduction for mitigation by them.

The Board remains seized with any difficulty arising out of the implementation of its decision.

4. For the assistance of the parties the Board wishes to clarify its order with respect to the posting as follows: The Board orders that the respondents post copies of the attached notice marked "Appendix", after being duly signed by Mr. Erwin Walter, in conspicuous places in the plant, where they are likely to come to the attention of employees, and to keep the notices posted for sixty consecutive working days; reasonable steps shall be taken by the respondents to ensure that the notices are not altered, defaced, or covered by any other material; reasonable physical access to the premises shall be given to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with; and the respondents shall deliver a copy of this notice, after being duly signed by Mr. Erwin Walter, by regular prepaid first class mail to all persons employed by the corporate respondent as at May 15, 1986.

5. Prior to giving its oral decision, the Board advised the parties that it would provide its reasons in writing. These reasons follow.

6. Both respondents were represented by the respondent Mr. Erwin Walter. Mr. Walter had previously obtained legal advice but chose to appear before the Board without counsel, as is his right.

7. In an earlier decision of the Board dated June 6, 1986, by a differently constituted panel, the applicant was certified as bargaining agent for all employees of the respondent Walter Tool and Die Ltd. (hereinafter the "company") in the City of Barrie, save and except foremen, persons above the rank of foreman, office, clerical and sales staff.

8. In these complaints under section 89 of the *Labour Relations Act*, the complainant sets out particulars of what it alleges amounts to violations of sections 3, 64, 66 and 70 of the Act.

9. The respondent Erwin Walter is the president and sole shareholder of the respondent Walter Tool And Die Ltd. Mr. Walter is, and was at all material times, the person through whom the company acted, so that, for all practical purposes, Mr. Walter is Walter Tool and Die Ltd. For that reason and in order to ensure that the order of the Board is given proper effect, we find it appropriate to make the order against both the company and Mr. Walter personally (see *Sunnylea Foods Limited*, [1981] OLRB Rep. Nov. 1640).

10. The company has operated continuously since 1977. It developed and grew gradually to

its present size and form and operates what appears to be a profitable business producing injection moldings, lead castings and moulds.

11. The only evidence heard by the Board was that of Mr. Walter who took the witness stand himself. Mr. Walter candidly and forthrightly admitted and accepted as correct the allegations made by the complainant in Appendix "B" of the complaint as amended. Set out in full, these allegations are as follows:

The complainant states that:

1. On May 12, 1986 the complainant submitted an application for certification for a bargaining unit of employees of the respondent.
2. On May 15, 1986 Steve Banks, an organizer for the complainant, received a call at approximately 9:45 a.m. from Erwin Walter, president of the respondent. Mr. Walter advised Mr. Banks that handicapped employees in the employ of the respondent would be terminated from employment and that temporary employees would be put on layoff. Other employees would be replaced by robots with any remaining employees to be put on salary. Mr. Walter also stated that he would build a plant in the United States of America and close the Barrie facility. Mr. Walter referred to the year 1971 stating that in that year a union organized his business in Toronto and that he closed the plant and sold it. Mr. Walter also advised Mr. Banks that he (Mr. Walter) was going to type a letter and take it to the employees to keep the union out by showing their objection to a union. In addition, Mr. Walter made reference to obtaining the services of a lawyer and beating the union by stalling.
3. On May 15, 1986 Mr. Erwin Walter spoke to Mr. Steve Banks by phone at approximately 12 noon. At that time and in a subsequent telegram on May 15, 1986 to Frank Berry, staff representative of the complainant, Mr. Walter advised the complainant that Mr. Walter intended to hold a vote of employees on May 20, 1986 without the involvement of the Labour Relations Board.
4. On or about May 20, 1986 a letter signed by Mr. Walter was distributed to employees of the respondent. A copy of this letter is attached as Exhibit 1 to this Appendix.
5. On May 23, 1986 the respondent posted a notice in the workplace a copy of which is attached thereto as Exhibit 2 to Appendix "B". In this notice the respondent advised the employees that due to an Application for Certification the respondent was closing down production between 11 p.m. Thursday, May 29th and 11 p.m. Sunday, June 1st.
6. All bargaining unit employees of the respondent were laid off by the respondent without pay from May 29, 1986 at 11 p.m.
7. On or about May 26, 1986 at approximately 8:50 a.m., Mr. Erwin Walter spoke to several employees of the respondent in the lunchroom at the respondent's premises. Mr. Erwin told the employees gathered that he made enough money and could close the respondent's operation at any time.
8. On or about May 28, 1986 bargaining unit employees of the respondent were advised of a lay off effective June 8, 1986.
9. On May 30, 1986 a panel of the Ontario Labour Relations Board convened in Boardroom C to hear the complainant's Application for Certification (Board File: 0432-86-R). The panel of the Board consisted of Mr. H. Freedman, Vice-Chairman of the Board, and members Kobryn and Wightman. Before that panel of the Board and at approximately 2:45 p.m. on May 30, 1986, Mr. Walter who is a principal shareholder of the respondent and who served as the respondent's spokesman, told the Board that the respondent would cease to exist as of June 15, 1986, except for five production staff who would wind up the business and except for the "tool room", both of which would continue for one year to fulfill contractual and apprenticeship obligations.

10. Mr. Walter further advised that the reason for his decision was that it was not possible for him to work with a union affiliated bargaining unit because it was against his personal character to do so.

The complainant alleges that the action of the respondent constitutes violations of sections 3, 64, 66 and 70 of the *Labour Relations Act*.

12. In addition, Mr. Walter openly stated that he would not negotiate or otherwise deal with the applicant or any other union, that he would reject *any* bargaining proposal made by the complainant, and that, if the complainant were to give up its bargaining rights the company would carry on operating as before and that if it did not the company would be closed down and the company's employees would lose their jobs. He specifically confirmed the statement made in a letter dated May 20, 1986, a copy of which was sent to all employees and to the complainant (Exhibit 6) that "the day a union is certified in Walter Industries [sic] I will cease to be associated with the company in any capacity and will liquidate my investment." In addition, Mr. Walter on several occasions stated that his position was "unshakable" and "immovable".

13. The Board also heard that the operations of the company were curtailed by the respondents on Thursday May 29, 1986 at 11:00 p.m. and that the company remained closed for all of May 30, 1986, ostensibly to permit any employee who wished to attend the certification hearing being held at the Board on May 30 1986 to do so. Apparently, several employees had requested the day off in order to be able to attend the hearing. No employee was paid for any of the hours that he or she would have worked but for the shutdown, whether or not they had requested the day off. There was some suggestion at the hearing that the company could not have operated on that day but there was no evidence or reasonable explanation as to why that was so. The respondents did not stress that position in any event.

14. Finally, the Board heard evidence with respect to a number of layoffs of bargaining unit employees shortly after the successful certification application by the applicant. Four employees were "laid off" on June 6, 1986 and three more were laid off on June 15, 1986. The complainant takes issue with two of the layoffs, namely that of Earl Devoe on June 15, 1986 and that of Mike Leinweber on June 6, 1986. These two individuals were organizers for the complainant in the successful certification proceeding and they were known as such to Mr. Walter. Mr. Walter's evidence was that these individuals were laid off because there was no more work for them to do and not because of their involvement with the complainant. The Board was told there was normally a slow-down in the company's business over the summer months and that six out of thirteen "machines" were presently standing idle. However, the Board also heard that Mr. Devoe's machine was being operated by another employee and that there was and is other work available for both Mr. Devoe and Mr. Leinweber to do.

15. The position of the respondents as expressed and implied through the evidence and submissions of Mr. Walter was as follows:

- (a) The respondents would not interfere with the freedom of any person to join a trade union but they would not negotiate with such a trade union.
- (b) the unique nature of the company's operations makes union representation of its employees impossible;
- (c) the respondents have the right to operate the company as they see fit (including closing it down) and to express opinions freely;
- (d) that the fact that the complainant had filed a complaint under section 89 of the Act against Mr. Walter personally is a breach of his rights under the *Canadian Charter of*

Rights and Freedoms being Part 1 of the *Constitution Act, 1981* (hereinafter the "Charter");

- (e) that requiring the respondents to bargain with the complainant is a breach of the rights of the respondents under the charter;
- (f) that it would have been improper and a breach of sections 13 and 64 of the Act to pay any of the employees for their missed hours on May 29 and 30, 1986 by reason that it would have been a financial contribution to the complainant;
- (g) that there was no anti-union motive for the "layoffs" of Devoe and Leinweber.

16. On several occasions during the course of the proceedings, Mr. Walter urged the Board to dismiss the complaints as being a "waste of everybody's time". In view of the evidence and admissions of Mr. Walter on behalf of the respondents, the Board found it unnecessary to call upon counsel for the complainant to respond and dismissed these "motions" outright.

17. Having heard the evidence and the submissions of the parties, the Board has no difficulty in concluding that the respondents and each of them is in violation of the Act and specifically sections 64, 66 and 70 thereof.

18. Stating publicly and directly to the employees that the respondents will not deal with the complainant or any other trade union, and indeed the company will close down unless the complainant abandons its bargaining rights and the bargaining unit employees, is a flagrant anti-union position. The respondents are quick to complain that their rights under the Charter have been infringed, yet they seek to flout and deny the rights of both their employees and the complainant, and the law of Ontario, with impunity. There is no room in this province for such conduct or for such threats which are clearly contrary to both the letter and the spirit of the *Labour Relations Act*.

19. The *Labour Relations Act* specifically gives every person to whom it applies the right to join a trade union of his choice and to participate in its lawful activities. It is an offence under the Act for any person or employer to interfere with the representation of employees by a trade union or to interfere with the exercising of any rights under the Act. There can be no doubt that the respondents have, by their actions and by their refusal to recognize or deal with the union, interfered with the freedom of their employees to participate in their trade union's lawful activities and with the exercise by both these employees and the complainant of their rights under the Act. This interference constitutes a breach of sections 64, 66 and 70 of the Act.

20. That the uniqueness of the company makes it unsuitable for collective bargaining was an argument made by the respondents in the certification proceedings before this Board to a differently constituted panel (Board File No. 0432-86-R) where it was rejected. Having been previously decided, this issue is not properly raised before the Board in the context of these complaints. There is, in any event, no merit to that argument for the reasons given in the earlier decision.

21. There is no doubt that the respondents may do and say what they like, but only so long as they do so within the law, which law includes the *Labour Relations Act*. Indeed section 77 of the Act specifically permits an employer to suspend or discontinue operations for cause, and section 64 confirms that an employer is free to express his views. However, it is not permissible to do so or to threaten to do so for any improper or illegal motive or reason. To suspend or discontinue operations or to threaten to do so for the purpose of compelling or inducing employees to refrain from exercising rights or privileges under the Act or for any anti-union purpose is illegal and a breach of the Act.

22. The Board has previously stated that it is obliged to deal with and determine a constitu-

tional issue which has been raised before it (*Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261). Mr. Walter raises sections 2 and 52 of the Charter in defence of the complaints made against the respondents. These sections provide as follows:

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

52. (1) The constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the constitution is, to the extent of the inconsistency, of no force and effect.

23. The Board notes that there is no evidence or other indication with respect to whether or not notice of the challenges or validity of the *Labour Relations Act*, which is implicit in the respondents' position, was given to either the Attorney General for Canada or the Attorney General for Ontario. In view of its disposition of the matter however, the Board finds it unnecessary to deal with the issue of such notice in this case.

24. Section 52 of the Charter is declaratory in nature and does not create substantive rights. The thrust of the arguments made by the respondents that their rights under section 2 of the Charter had been violated relate to their freedom of opinion and expression and freedom of association. The Board finds no merit in the respondents' argument that Mr. Walter's freedom of association has been abridged by the mere filing of a complaint against him personally and which was the sole basis of the Charter argument made by the respondents that is relevant to the issues before the Board at this time. Notwithstanding Mr. Walter's statements of intention, there is no complaint before the Board that the respondents have failed to bargain fairly with the complainant and that issue is therefore not before us. Consequently, that part of the respondent's argument that suggests that any requirement that they bargain with the complainant is a breach of their rights under section 2 of the Charter can be of no assistance to the respondents and the Board finds it unnecessary to deal with that argument in disposing of these complaints. Nor is the Board persuaded that either respondent's freedom of opinion or expression, insofar as these may be protected by the Charter, have been interfered with in these matters, either by operation of the *Labour Relations Act* or otherwise.

25. There is no evidence to support the suggestions of the respondents that it was necessary to shut down the plant to enable the employees to attend the certification hearings before the Board on May 30, 1986. Nor is there any merit to the respondents' argument that had they paid any of those employees the wages they would have earned that day but for the shutdown, it would have been guilty of violations of sections 13 and 64 of the Act. It is difficult to understand how paying employees who had not requested a day off could be reasonably construed as being a financial contribution to the complainant. On the other hand, it is not difficult for the Board to conclude, given the statements and admissions of the respondents, that the shutdown and refusal to pay was at least partly, if not wholly, in response to and in retribution for the bringing of the application for certification, which is a violation of sections 64, 66 and 70 of the Act.

26. The Board has considered the assertions of the respondents that Mr. Devoe and Mr. Leinweber were not laid off as a result of any anti-union animus in the light of the admissions that

both of them were known to be union organizers, that they were laid off because of a shortage of work even though there was work available for them to do (indeed the very work that Mr. Devoe had been doing immediately prior to his layoff was, at the date of the hearing, being done by someone else) and the attitude of the respondents towards the applicant and trade unions in general as evidenced by the statements and admissions referred to above. It is common in cases such as this for an employer to assert that a termination of employment, however labelled, was not motivated by any anti-union animus. Consequently, the Board is required to draw its own conclusions with respect to the employer's motivation and in so doing must draw inferences from the evidence, including any anti-union posture adopted by the employer. It is also clear that anti-union animus need form only a part of the motivation for the employer's actions (see *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, *DeVilbiss (Canada) Ltd.*, [1975] OLRB Rep. Sept. 678, *Hallowell House Ltd.*, [1980] OLRB Rep. Jan. 35, *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755, among others). In addition, under section 89(5) of the Act, the onus is on the respondents to satisfy the Board that there was no anti-union animus. The respondents have failed to discharge that onus and, in any event, the Board is satisfied on the basis of the evidence before it that there was anti-union animus involved in the decision of the respondents to "lay off" both Mr. Devoe and Mr. Leinweber.

27. In the course of these proceedings there was evidence that some, if not all, of the Company's customers required the Company to agree to advise them if the Company was unionized so that they might take their work elsewhere and that the Company did so agree. The complainant asks that the Board declare that such agreements violate the *Labour Relations Act*. There is insufficient evidence before the Board to enable it to deal with this issue in its broad context. For example, such "agreements" appear to be at least partly in writing and we have none of them in evidence before us. In addition, in this particular case, we are not satisfied that any of the work has been removed from the Company in violation of the *Labour Relations Act*. This issue must therefore be left to another time.

28. For all the foregoing reasons the Board confirms its oral decision as clarified herein.

29. After the Board had rendered its oral decision, Mr. Walter made the statement that all that the Board had ordered would be done but that the Board had just shut down the Company. We are constrained to remind Mr. Walter that, upon being given notice to bargain, the Company is required to bargain with the complainant and make every reasonable effort to make a collective agreement. Furthermore, any intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or cease to be a member of a trade union or to refrain from exercising any other rights under the *Labour Relations Act* constitutes a violation of the Act and, if brought before the Board, will be dealt with appropriately.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE COMPANY AND THE UNION PARTICIPATED AND HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT THE COMPANY AND MR. WALTER VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM YOU OF YOUR RIGHTS AND OBLIGATIONS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT DISCHARGE OR THREATEN TO DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHY.

WE WILL NOT IN ANY MANNER INTERFERE WITH OR RESTRAIN OR COERCE EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH THE DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL NOT INTERFERE WITH THE REPRESENTATION OF OUR EMPLOYEES BY THE UNITED STEELWORKERS OF AMERICA.

WE WILL PERMIT THE UNITED STEELWORKERS OF AMERICA REASONABLE ACCESS TO OUR PREMISES DURING WORKING HOURS FOR THE PURPOSE OF HOLDING ONE MEETING WITH BARGAINING UNIT EMPLOYEES.

WE WILL PAY TO EACH EMPLOYEE WHO DID NOT REQUEST TIME OFF FOR MAY 30, 1986 THEIR WAGES FOR THAT DAY.

WE WILL IMMEDIATELY REINSTATE TO EMPLOYMENT EARL DEVOE AND MIKE LEINWEBER AND PAY COMPENSATION FOR THEIR LOST WAGES AND BENEFITS.

WE RECOGNIZE OUR OBLIGATION TO BARGAIN FAIRLY WITH THE UNITED STEELWORKERS OF AMERICA AND TO MAKE EVERY REASONABLE EFFORT TO ENTER INTO A COLLECTIVE AGREEMENT.

WALTER TOOL AND DIE LIMITED

PER: ERWIN WALTER, PRESIDENT

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

CASE LISTINGS JULY 1986

	PAGE
1. Applications for Certification	187
2. Applications for First Contract Arbitration	202
3. Applications for Declaration of Related Employer	202
4. Sale of a Business	202
5. Applications for Declaration Terminating Bargaining Rights	203
6. Referral to Appointment of Conciliation Officer	205
7. Applications for Declaration of Unlawful Strike (Construction Industry)	205
8. Complaints of Unfair Labour Practice	205
9. Applications for Religious Exemption	209
10. Applications for Consent to Early Termination of Collective Agreement	209
12. Applications for Determination of Employee Status	209
13. Complaints Under the Occupational Health and Safety Act	210
14. Colleges Collective Bargaining Act	210
14. Construction Industry Grievances	210
15. Applications for Reconsideration of Board's Decision	213

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1986

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1283-85-R: Christian Labour Association of Canada, (Applicant) v. Ceby Management Limited operating as Aurora Resthaven Extended Care & Convalescent Centre, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Aurora, save and except department heads and co-ordinator, persons above the rank of department head and co-ordinator, registered and graduate nurses, office and clerical staff, paramedical personnel, chaplains, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (82 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Aurora regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads and co-ordinator, persons above the rank of department head and co-ordinator, registered and graduate nurses, office and clerical staff, paramedical personnel and chaplains." (*Having regard to the agreement of the parties*).

1593-85-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351, (Applicant/Complainant) v. The Young Manufacturer Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, employees employed at and out of its retail outlet, office and clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (44 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1815-85-R: International Union of Operating Engineers Local 793, (Applicant) v. Jim Bertram & Sons Construction Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

Unit #2: "all employees of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

2044-85-R; 2045-85-R: United Steelworkers of America, (Applicant) v. Terra Footwear Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Markdale, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (113 employees in unit).

Unit #2: "all office employees of the respondent in Markdale, save and except supervisors, persons above the rank of supervisor and sales staff." (10 employees in unit).

2163-85-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Zentil Plumbing & Heating Ltd., (Respondent).

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering) the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit). (*Having regard to the agreement of the parties*).

2763-85-R: Fraternite Inter-Provinciale des Ouvriers en Electricite (F.I.P.O.E.), (Complainant) v. Dustbane Enterprises Limited (Dustbane Products Limited) v. Group of Employees, (Objectors).

Unit #1: (See *Applications for Certification Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent in its Brushcraft Division in the Regional Municipality of Ottawa-Carleton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, truck drivers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, and employees covered by the Board certificate issued in Board proceeding #2401-83-R". (19 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #3: (See *Applications for Certification Dismissed Without Vote*).

Unit #4: (See *Applications for Certification Dismissed Without Vote*).

3144-85-R: Fraternite Inter-Provinciale Des Ouvriers En Electricite Inter-Provincial Brotherhood of Electrical Workers, (Applicant) v. Florence Paper Company (1985) Inc., (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (20 employees in unit). (*Having regard to the agreement of the parties*).

3152-85-R; 0026-86-R: United Food and Commercial Workers International Union, (Applicant) v. The Northumberland and Newcastle Board of Education, (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit #1: (See *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all teachers aides regularly employed by the respondent for not more than twenty-four hours per week in the County of Northumberland and the Town of Newcastle save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any affiliate or branch affiliate within the meaning of the School Boards and Teachers Collective Negotiations Act or any trade union held bargaining rights as of March 21, 1986." (4 employees in unit). (*Having regard to the agreement of the parties*).

3198-85-R: Amalgamated Clothing & Textile Workers Union, (Applicant) v. Harding Carpets Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons and those above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

0014-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Camax Construction Limited o/a Albany Excavating, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and simi-

lar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0237-86-R: Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Birkdale Villa, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent in the Municipality of Metropolitan Toronto save and except registered, graduate, and undergraduate nurses, professional medical staff, paramedical employees, office and clerical staff, supervisors and persons above the rank of supervisors, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (26 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: (See: *Applications for Certification Dismissed Without Vote*).

0278-86-R: Ontario Nurses’ Association, (Applicant) v. Winchester District Memorial Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in Winchester, Ontario save and except Head Nurses, persons above the rank of Head Nurse and persons regularly employed for not more than twenty-four hours per week.” (85 employees in unit).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent at Winchester, Ontario regularly employed for not more than twenty-four hours per week, save and except Head Nurses and persons above the rank of Head Nurse.” (85 employees in unit).

0294-86-R: Canadian Union of Public Employees, (Applicant) v. Long Island Day Care Centre Inc., (Respondent).

Unit: “all employees of the respondent in Manotick save and except supervisor, persons above the rank of supervisor and persons regularly employed for not more than twenty-four (24) hours per week.” (3 employees in unit). (*Having regard to the agreement of the parties*).

0306-86-R: Amalgamated Clothing and Textile Workers Union Montreal Joint Board, (Applicant) v. Irwin Enterprises Canada Ltd., (Respondent).

Unit: “all employees of the respondent in Cornwall, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, and office and sales staff.” (26 employees in unit). (*Having regard to the agreement of the parties*).

0430-86-R: Ontario Catholic Occasional Teachers’ Association, (Applicant) v. Windsor Roman Catholic Separate School Board, (Respondent).

Unit: “all occasional teachers employed by the respondent in the City of Windsor, save and except employees in bargaining units for which any trade union held bargaining rights as of May 12, 1986.” (158 employees in unit).

0498-86-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Red Oak Limited Partnership, (Respondent).

Unit: “all employees of the respondent in Peterborough, save and except supervisors, those persons above the rank of supervisor, office and sales staff, those persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and those employees in bargaining units

for which any trade union held bargaining rights as of May 20, 1986.” (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0507-86-R: Syndicat Des Employes De Scierie Trifluvienne, Local 261 Inc., (Applicant) v. Modern Windows V.H. Inc., (Respondent).

Unit: “all persons employed by the respondent in the Town of Van Kleeck Hill in the Province of Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (32 employees in unit). (*Having regard to the agreement of the parties*).

0513-86-R: United Steelworkers of America, (Applicant) v. Vicon Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at 45 Stafford Court, Cambridge, save and except forepersons, quality control supervisor, persons above the rank of foreperson and control supervisor, office, clerical and sales staff and students employed during the school vacation period.” (31 employees in unit). (*Having regard to the agreement of the parties*).

0573-86-R: Ontario Public Service Employees Union, (Applicant) v. The Children’s Aid Society of Ottawa-Carleton, (Respondent).

Unit #1: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except: supervisors; persons above the rank of supervisor; secretaries to: the executive director, the assistant executive director, division director services east, director of family and children services east, director of placement services; secretary & administrative assistant to the director of finance and administration; accounting analyst; administrative secretary to director of treatment services; secretary & administrative assistant to director of personnel; secretary & staffing assistant to co-ordinator of staffing; persons regularly employed for not more than twenty-four (24) hours per week; students employed during the school vacation period; and employees in bargaining units for which any trade union held bargaining right as of May 27, 1986.” (81 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except: supervisors; persons above the rank of supervisor; secretaries to: the executive director, assistant executive director, division director services east, director of family and children services east, director of placement services; secretary & administrative assistant to director of finance and administration; accounting analyst; administrative secretary to the director of treatment services; secretary & administrative assistant to director of personnel; secretary and staffing assistant to the co-ordinator of staffing; and employees in bargaining units for which any trade union held bargaining rights as of May 27, 1986.” (3 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0597-86-R: Canadian Staff Union, (Applicant) v. Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO), (Respondent).

Unit: “all employees of the respondent employed at and out of the Municipality of Metropolitan Toronto, save and except those employees covered by a subsisting collective agreement between the Office and Professional Employees’ International Union, Local 343 and the respondent.” (3 employees in unit).

0604-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Metropolitan Toronto Convention Centre Corporation, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, security staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (98 employees in unit). (*Having regard to the agreement of the parties*).

0607-86-R: Ontario Public Service Employees Union, (Applicant) v. The Drop-In Centre Kingston Incorporated, (Respondent).

Unit #1: "all employees of the Respondent at Kingston save and except House Directors, persons above the rank of House Director, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the Respondent at Kingston regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except House Directors, persons above the rank of House Director, office and clerical staff." (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0645-86-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Lundrigans Construction Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0648-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Cornwall Fruit Supply Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

0654-86-R: United Steelworkers of America, (Applicant) v. Kafko Manufacturing (1980) Limited, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period." (49 employees in unit). (*Having regard to the agreement of the parties*).

0657-86-R: Christian Labour Association of Canada, (Applicant) v. Salvation Army Eventide Home, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Cambridge, save and except supervisors, persons above the rank of supervisor, Administrator, Assistant Administrator, Activity Director, Director of Nursing, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (42 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent at Cambridge, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, Administrator, Assistant Administrator, Activity Director, Director of Nursing and office and clerical staff". (29 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0658-86-R: Energy and Chemical Workers Union, (Applicant) v. New Hermes Limited, (Respondent).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

0690-86-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527, (Applicant) v. Resolute Development Corp., (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

0716-86-R: London and District Service Workers' Union, Local 220 SEIU, AFL, CIO, CLC, (Applicant) v. Diversicare I Limited Partnership, (Respondent).

Unit: "all employees of the respondent at its Oxford Regional Nursing Home in Ingersoll, Ontario, regularly employed for not more than 24 hours per week, save and except registered, graduate and undergraduate nurses, activation co-ordinator, supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period." (25 employees in unit). (*Having regard to the agreement of the parties*).

0734-86-R: Labourers' International Union of North America, Local 527, (Applicant) v. Federal Paving Company Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

0736-86-R: The Canadian Union of Public Employees, (Applicant) v. VS Services Ltd., (Respondent).

Unit: "all employees of the respondent working in dietary at Hastings Manor Home for the Aged in Belleville regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, dietitians, chef, and persons in bargaining units for which any trade union held bargaining rights as of June 12, 1986." (2 employees in unit). (*Having regard to the agreement of the parties*).

0757-86-R: Labourers' International Union of North America, Local 837, (Applicant) v. Aldershot Contractors Equipment Rental Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0790-86-R: United Steelworkers of America, (Applicant) v. Wheel Tronic Inc. and/or 554072 Ontario Ltd. o/a Space Saver Hoist Company, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above

the rank of foreperson, office, sales staff, and customer service technicians." (21 employees in unit). (*Having regard to the agreement of the parties*).

0809-86-R: Laundry and Linen Drivers and Industrial Workers, Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Walker Atlantic Glass Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 175 Commander Blvd., Scarborough, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (91 employees in unit). (*Having regard to the agreement of the parties*).

0830-86-R: Labourers' International Union of North America Local 527, (Applicant) v. Bectar Corporation, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (19 employees in unit).

0842-86-R: United Steelworkers of America, (Applicant) v. Coinmatic Leasing Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Cambridge, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*).

0848-86-R: Ontario Public Service Employees Union, (Applicant) v. Manitoulin Health Centre, (Respondent).

Unit: "all paramedical employees of the respondent at Little Current, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except chief laboratory technologist, chief radiology technologist, Director of Medical Records, Director of Physiotherapy and persons above those ranks, clerical and office workers and those employees in bargaining units for which any trade union held bargaining rights as of June 20, 1986." (3 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0865-86-R: Ontario Public Service Employees Union, (Applicant) v. The Children's Aid Society of Northumberland, (Respondent).

Unit: "all office and clerical employees of the respondent in the County of Northumberland, save and except supervisors, persons above the rank of supervisor, Executive Secretary to the Executive Director, and employees in bargaining rights as of June 25, 1986." (6 employees in unit). (*Having regard to the agreement of the parties*).

0866-86-R: Labourers International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 187, (Respondent).

Unit: "all employees of the respondent at 3390 Weston Road in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property managers and persons above the rank of property manager." (4 employees in unit).

0870-86-R: Canadian Union of Public Employees, (Applicant) v. Hastings Centennial Manor, (Respondent).

Unit #1: "all employees of the respondent at the Village of Bancroft, save and except supervisors, persons above the rank of supervisor, office and clerical staff, graduate and registered nurses, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at the Village of Bancroft regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff, graduate and registered nurses." (24 employees in unit). (*Having regard to the agreement of the parties*).

0871-86-R: The Canadian Union of Public Employees, (Applicant) v. The Windsor Public Library Board, (Respondent).

Unit: "all employees of the respondent in Windsor regularly employed for not more than twenty-four (24) hours per week, save and except branch librarian and main librarian, persons above the rank of branch librarian and main librarian and pages." (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0885-86-R: Ontario Public Service Employees Union, (Applicant) v. Craigwood Youth Services, (Respondent).

Unit: "all employees of the respondent in London and Ailsa Craig, Ontario, save and except supervisors, persons above the rank of supervisor, the executive secretary at head office in London and the division secretary in Ailsa Craig." (49 employees in unit). (*Having regard to the agreement of the parties*).

0895-86-R: United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. Sunnybrook Foods Limited, (Respondent).

Unit: "all employees of the respondent in its stores in Ontario, save and except department managers, porters, head office and warehouse staff, employees employed for not more than twenty-eight hours per week and students employed during the Easter vacation, the Christmas vacation or the period May 14 to September 17 inclusive." (43 employees in unit).

0918-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Doug Roe Enterprises Ltd. c.o.b. as Mid-Ontario Disposal, (Respondent).

Unit #1: "all employees of the respondent in the County of Simcoe, save and except foremen, persons above the rank of foreman, sales, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (21 employees in unit).

Unit #2: "all employees of the respondent in the County of Simcoe regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, sales, office and clerical staff." (21 employees in unit).

0921-86-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Teejay Mechanical Contractors, (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0941-86-R: Energy and Chemical Workers Union, (Applicant) v. Canuck Compounders Inc., (Respondent).

Unit #1: "all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above

the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (7 employees in unit).

Unit #2: “all employees of the respondent at Cambridge, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman office, clerical and sales staff.” (2 employees in unit).

0948-86-R: International Brotherhood of Painters and Allied Trades Local Union 1891, (Applicant) v. Best-Way Plastering Thunder Bay Ltd., (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Clarity Note*).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Clarity Note*).

0962-86-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Ford Mechanical (Division of Ford Plumbing and Heating Company Limited), (Respondent).

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan) the County of Victoria (except for the geographic Township of Manvers) and the Provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit). (*Clarity Note*).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0005-86-R: International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Skeates Plastering (Burlington) Ltd., (Respondent) v. Labourers’ International Union of North America, Local 837, (Intervener).

Unit #1: “all journeymen drywall tapers, journeymen plasterers and journeymen fireproofing applicators and their respective apprentices or trainees in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Clarity Note*).

Unit #2: “all journeymen drywall tapers, journeymen plasterers and journeymen fireproofing applicators and their respective apprentices or trainees in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Clarity Note*).

Unit #3: “all journeymen drywall tapers, journeymen plasterers and journeymen fireproofing applicators and their respective apprentices or trainees in the employ of the respondent in the area formerly embraced by the Townships of Carling, Ferguson, McDougall, Foley and Cowper in the District of Parry Sound, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters’ list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		4
Number of ballots marked in favour of intervener		0

0006-86-R: International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Smith

Brothers' Contracting Limited, (Respondent) v. Labourers' International Union of North America, Local 837, (Intervener).

Unit #1: "all journeymen drywall tapers, journeymen plasterers and journeymen fireproofing applicators and their respective apprentices or trainees in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit). (*Clarity Note*).

Unit #2: "all journeymen drywall tapers, journeymen plasterers and journeymen fireproofing applicators and their respective apprentices or trainees in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit). (*Clarity Note*).

Unit #3: "all journeymen drywall tapers, journeymen plasterers and journeymen fireproofing applicators and their respective apprentices or trainees in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		8
Number of ballots marked in favour of intervener		1

0321-86-R: Inter-Provincial Brotherhood of Electrical Workers Fraternite Inter-Provinciale des Ouvriers en Electricite, (Applicant) v. Modern Building Cleaning Inc., (Respondent).

Unit: "all employees of the respondent at the Communications Research Centre, Shirley's Bay Complex, 3701 Carling Avenue, Ottawa, save and except forepersons, clerical and sales staff." (16 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		2

0564-86-R: The Canadian Union of Public Employees, (Applicant) v. Town of Wasaga Beach, (Respondent).

Unit: "all employees of the respondent in Town of Wasaga Beach, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, ambulance service, fire department, library staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		11

0624-86-R: Canadian Union of Public Employees, (Applicant) v. St. Joseph's Hospital and St. Joseph's Home, (Respondents).

Unit: "all lay employees of the respondents regularly employed for not more than twenty (20) hours per week and students employed during the school vacation periods, save and except supervisors, persons above the rank of supervisor, professional staff, paramedical staff, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of June 2, 1986." (105 employees in unit).

Number of names of persons on revised voters' list		112
Number of persons who cast ballots	51	

Number of segregated ballots cast by persons whose names do not appear on voters' list	2	
Number of ballots marked in favour of applicant		40
Number of ballots marked against applicant		9
Ballots segregated and not counted		2

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2160-85-R: Ontario Public School Teachers' Federation, (Applicant) v. The Kenora Board of Education, (Respondent).

Unit: "all occasional teachers employed by the respondent in its elementary panel in the District of Kenora, save and except employees in bargaining units for which any trade union held bargaining rights as of November 26, 1985." (53 employees in unit).

Number of names of persons on revised voters' list		53
Number of persons who cast ballots	34	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		28
Number of ballots marked against applicant		5

3046-85-R: Ontario Nurses' Association, (Applicant) v. St. Mary's of the Lake Hospital, (Respondent) v. St. Mary's of the Lake Hospital Employees' Association, (Intervener) v. Employee, (Objector).

Unit: "all full-time registered and graduate nurses who are engaged in a nursing capacity by the respondent save and except the Sisters, head nurses, and those above the rank of head nurses." (48 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant		31
Number of ballots marked in favour of intervener		8

0028-86-R: Canadian Union of Public Employees, (Applicant) v. Northumberland and Newcastle Board of Education, (Respondent) v. United Food and Commercial Workers' International Union, (Intervener).

Unit: "all teachers aides employed by the respondent in the County of Northumberland and the Town of Newcastle save and except supervisors, persons above the rank of supervisor, teachers aides regularly employed for not more than twenty-four hours per week, and employees in bargaining units for which any affiliate or branch affiliate within the meaning of the School Boards and Teachers Collective Negotiations Act or any trade union held bargaining rights as of March 21, 1986." (51 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		70
Number of persons who cast ballots	53	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	50	
Number of segregated ballots cast by persons whose name appear on voters' list	2	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of ballots marked in favour of UFCW		15
Number of ballots marked in favour of CUPE		33
Number of ballots marked in favour of NO TRADE UNION		3

Applications for Certification Dismissed Without Vote

2763-85-R: Fraternite Inter-Provinciale des Ouvriers en Electricite (F.I.P.O.E.), (Complainant) v. Dustbane Enterprises Limited (Dustbane Products Limited), (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #2: (See: *Bargaining Agents Certified Without Vote*).

Unit #3: "all employees of the respondent in its Tarbox Division in the Regional Municipality of Ottawa-Carleton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, truck drivers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, and employees covered by the Board certificate issued in Board proceeding #2401-83-R." (33 employees in unit).

Unit #4: "all employees of the respondent in its Equipment Division in the Regional Municipality of Ottawa-Carleton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, truck drivers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, and employees covered by the Board certificate issued in Board proceeding #2401-83-R." (10 employees in unit).

2992-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Consbec Inc., (Respondent) v. Labourers' International Union of North America Ontario Provincial District Council and Labourers' International Union of North America, Local 607, (Interveners). (9 employees in unit).

0237-86-R: Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Birkdale Villa, (Respondent) v. Group of Employees, (Objectors). (26 employees in unit).

Unit #1: (See: *Bargaining Agents Certified Without Vote*).

0685-86-R: Canadian Union of Public Employees, (Applicant) v. Victoria University, (Respondent). (44 employees in unit).

0687-86-R: Service Employees Union Local 210 Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Windsor Roman Catholic Separate School Board, (Respondent) v. Ontario Public Service Employees Union, (Intervener). (58 employees in unit).

0735-86-R: Sheet Metal Workers' International Association Local 540, (Applicant) v. Hydra-Lift Industries Ltd., (Respondent) v. Group of Employees, (Objectors). (32 employees in unit).

0776-86-R: London and District Service Workers' Union, Local 220 SEIU, AFL, CIO, CLC, (Applicant) v. Oxford Regional Nursing Home, (Respondent) v. Group of Employees, (Objectors). (55 employees in unit).

0791-86-R: Union of Bank Employees, Local 2104, (Ontario) CLC, (Applicant) v. National Trust, (Respondent) v. Group of Employees, (Objectors). (60 employees in unit).

0814-86-R: Service Employees Union Local 268, (Applicant) v. Lakehead University, (Respondent) v. Office & Professional Employees International Union Local 81, (Intervener). (19 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2969-85-R: Canadian Union of Educational Workers, (Applicant) v. University of Ottawa, (Respondent) v. The Association of Professors of the University of Ottawa (APUO) and Pierre-Yves Boucher, (Interveners).

Unit: "all part-time academic staff, *professional counsellors and professional librarians* of the Respondent in the Regional Municipality of Ottawa-Carleton, Stormont-Dundas, Renfrew North, Prescott and Lanark Counties, save and except: employees in bargaining units for which any trade union held bargaining rights with the Respondent as of the date of application, March 5th, 1986; employees who exercise managerial func-

tions or are employed in a confidential capacity in matters relating to labour relations; all those paid from other than operating funds; all students registered at the University of Ottawa *who do not have full responsibility for at least one course*; all persons who are otherwise actively involved in the practice of law including judges; all those engaged in the practice of medicine in the course of clinical teaching of medicine; all those involved in the clinical teaching of nursing and psychology; all those engaged in the teaching of non-credit courses, except for those engaged in the Centre of Second Language learning. (609 employees in unit). (Clarity Note).

Number of names of persons on revised voters' list	674
Number of persons who cast ballots	246
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	176
Number of segregated ballots cast by persons whose name appear on voters' list	69
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	167
Number of ballots marked against applicant	9
Ballots segregated and not counted	70

0056-86-R: Labourers' International Union of North America, Local 1059, (Applicant) v. McKay-Cocker Construction Limited, (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union 915, (Intervener).

Unit: "all working foremen, journeymen and apprentices cement finishers and waterproofers employed by the respondent engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all working foremen, journeymen and apprentice cement finishers and waterproofers employed by the respondent in all other sectors other than the industrial, commercial and institutional sector of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin and the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk." (2 employees in unit).

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	2

0120-86-R: Fraternite Inter-Provincial des Ouvriers en Electricite Inter-Provincial Brotherhood of Electrical Workers, (Applicant) v. The Service Depot Ltd., (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton save and except general manager, persons above the rank of general manager, and office and clerical staff." (12 employees in unit).

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	7

0297-86-R: Labourers' International Union of North America Local 607, (Applicant) v. P & G Construction Company, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing or restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the District of Thunder Bay, in the District of Rainy River, and in the District of Kenora, including the Patricia portion, save and except non-working foremen, persons above the rank of non-working foreman." (4 employees in unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		1
Number of ballots marked in favour of intervener		3

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2763-85-R: Fraternite Inter Provinciale des Ouvriers en Electricite (F.I.P.O.E.), (Complainant) v. Dustbane Enterprises Limited (Dustbane Products Limited), (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in its Chemical Division in the Regional Municipality of Ottawa-Carleton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, laboratory technicians, truck drivers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, and employees covered by the Board certificate issued in Board proceeding #2401-83-R." (29 employees in unit).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots	19	
BALLOT BOX SEALED		

3166-85-R: Energy and Chemical Workers Union, (Applicant) v. Petro Canada Inc., (Respondent).

Unit #1: "all service station employees employed by the respondent at its Highway 400 Service Center at Cookstown, Ontario, save and except shift supervisors, persons above the rank of shift supervisor, persons working in restaurant and food services operations, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	10	
Number of segregated ballots cast by persons whose name appear on voters' list		1
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		6

Unit #2: "all service station employees employed by the respondent at its Highway 400 Service Center at Cookstown, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save ad except the shift supervisors, persons above the rank of shift supervisor and persons working in restaurant and food services operations." (22 employees in unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		6

0239-86-R: Service Employees Union, Local 478, (Applicant) v. St. Joseph's General Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at Elliott Lake, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the administrator, secretary to the assistant administrator, secretary to the director of nursing, secretary to the director of personnel, intermediate accounting clerk, and person for whom any trade union held bargaining rights on April 17, 1986." (29 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voter's list		28
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		14

0247-86-R: Energy and Chemical Workers Union, (Applicant) v. Novopharm Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 247 Idema Road, Markham, Ontario save and except supervisors, persons above the rank of supervisor, roving quality control inspectors, office, sales and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (34 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		28
Number of persons who cast ballots	27	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		16

0444-86-R: Energy and Chemical Workers Union, (Applicant) v. Union Gas Limited, (Respondent).

Unit: "all office, clerical and *continuous part-time employees* of the respondent in Waterloo, save and except supervisors, persons above the rank of supervisor, sales, builder and dealer representatives, technicians, secretaries to the following; Regional Manager, Operations Manager, Regional Sales Manager, Manager Customer Information, Personnel Supervisor *and persons regularly employed for not more than twenty-four (24) hours per week.*" (67 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		63
Number of persons who cast ballots	56	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		49
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		32
Ballots segregated and not counted		7

0511-86-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Sunkist Fruit Markets Toronto Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except assistant store manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (162 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		54
Number of persons who cast ballots	52	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		48

0633-86-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. The Delta Meadowvale Inn, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 6750 Mississauga Road North, Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, sales, accounting, office, clerical, front desk staff, cashiers and those employees employed for not more than 24 hours per week." (161 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		113
Number of persons who cast ballots	96	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		71
Ballots segregated and not counted		1

Applications for Certification Withdrawn

2944-85-R: Canadian Paperworkers' Union, (Applicant) v. W. H. Smith Ltd. and Classic Bookshops (International) Ltd., (Respondents).

0543-86-R: Textile Processors, Service Trade, Health Care, Professional and Technical Employees, Local 351, (Applicant) v. Laser International Holdings (1983) Limited, (Respondent).

0700-86-R: Service Employees International Union Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Peel Memorial Hospital, (Respondent).

0749-86-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Bre-Ex Limited, (Respondent).

0763-86-R: Canadian Brotherhood of Railway, Transport & General Workers, (Applicant) v. Aatel Communications Inc., (Respondent).

0788-86-R: Amalgamated Clothing and Textile Workers' Union, (Complainant) v. Elco Kitchen Products Ltd., (Respondent).

0834-86-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Cecchetto & Sons Ltd., (Respondent) v. Labourers International Union of North America, Local 493, (Intervener).

0886-86-R: Service Employees International Union, Local 532, (Applicant) v. Klockner Moeller Limited, (Respondent).

0952-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), (Applicant) v. Uniroyal Ltd., Tire Factory and Rubber Machinery Shops, (Respondent) v. International Union of Operating Engineers, Local 772, (Intervener).

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

0819-86-FC: Toronto Typographical Union, Local 91, (Applicant) v. Burlington Northern Air Freight (Canada) Ltd., (Respondent). (*Granted*).

0821-86-FC: Canadian Paperworkers' Union, (Applicant) v. W. H. Smith Ltd., (Respondent). (*Withdrawn*).

0822-86-FC: Canadian Paperworkers' Union, (Applicant) v. W. H. Smith Ltd., (Respondent). (*Withdrawn*).

0823-86-FC: Canadian Paperworkers' Union, (Applicant) v. W. H. Smith Ltd., (Respondent). (*Withdrawn*).

0836-86-FC: United Brotherhood of Carpenters and Joiners of America, Local Union 1030, (Applicant) v. Nepean Roof Truss Limited, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2258-84-R: Local 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. J. Corda, Corda Construction, J. Corda Construction Ltd., Marklen Construction Limited, Hardrock Forming Co., Bankbridge Development Inc., Corda Development Inc., Corda Construction Ltd., and Concol Construction Ltd., (Respondents) v. Labourers' International Union of North America, Local 527, (Intervener). (*Granted*).

SALE OF A BUSINESS

2911-85-R: Labourers' International Union of North America Ontario Provincial District Council and Labourers' International Union of North America, Local 607, (Applicant) v. 353080 Ontario Limited c.o.b. as Rok Engineering Construction, Les Ingenieries Consbec Inc., (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener). (*Withdrawn*).

0634-86-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. The Stel Hotels Ltd. c.o.b. as Red Oak Inn, (Respondent). (*Withdrawn*).

0635-86-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. The Stel Hotels Ltd. c.o.b. as Red Oak Inn, Thunder Bay, Ontario, (Respondent). (*Withdrawn*).

0636-86-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Gamble Robinson Limited, M C Transitory Acquisition Corp., and Miller Cascade, Inc., (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1705-85-R: Olga York, (Applicant) v. Service Employees Union, Local 183, (Respondent) v. Gardiner's Supermarket Limited, (Intervener). (*Dismissed*).

1707-85-R: Terri Payne, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Bay Mills Limited, (Intervener).

Unit: "all employees of the intervener in the City of Brampton, save and except plant manager, maintenance supervisor, persons above the rank of maintenance supervisor, the shipper, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week students employed during the school vacation period and piece workers." (54 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by number		66
Number of persons who cast ballots	61	
Number of ballots marked in favour of respondent		21
Number of ballots marked against respondent		40

2270-85-R: Francine Marotta, (Applicant) v. Local 725, United Food and Commercial Workers International Union, (Respondent).

Unit #1: "all employees of Peoples, Division of Marks & Spencer Canada Inc., in its store at Hearst, regularly employed for not more than twenty-four (24) hours per week and students employed during off-school hours and during the school vacation period." (14 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		16

2271-85-R: Linda Grandmont, (Applicant) v. Local 725, United Food and Commercial Workers International Union, (Respondent).

Unit #2: "all (full-time) employees of Peoples, Division of Marks & Spencer Canada Inc., in its department store in Hearst, save and except the assistant manager and persons above the rank of assistant manager." (6 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

3118-85-R: Tracey Girard, (Applicant) v. Christian Labour Association of Canada, (Respondent) v. Central Stampings Limited, (Intervener).

Unit: "all office staff of the employer pursuant to the certificate issued by the Ontario Labour Relations Board dated September 17, 1986, save and except office manager, persons above the rank of office manager,

buyer, shipper-receiver, production control expeditor, management trainees, sales staff, time study observers, private secretaries, budget study analysts and students employed during the school vacation period.” (7 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		5

3213-85-R: Mr. Rene Bedana and Mr. W. S. Elford, (Applicants) v. Local 796 - I.U.O.E., (Respondent) v. Toronto College Street Centre Limited, (Intervener). (*Withdrawn*).

3223-85-R: Michael VanLandeghem, (Applicant) v. Labourers’ International Union of North America, Local 1036, (Respondent) v. Smale Bros. Company Limited, (Intervener). (*Dismissed*).

3227-85-R: Ronnie Aveyard, (Applicant) v. Energy and Chemical Workers Union, (Respondent). (*Granted*).

3233-85-R: Employees of Cara Operation Ltd. Flight Kitchens I and II, (Applicant) v. Hotel Employees and Restaurant Employees Union Local 75, (Respondent) v. Cara Operations, (Intervener). (*Dismissed*).

0275-86-R: Werner Veit, John Bonnetsmueller and Walter Seiz, (Applicants) v. The Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada Local Union No. 172 Restoration Steeplejacks, (Respondent) v. Neath Toronto Ltd., (Intervener).

Unit: “all employees of Neath Toronto Ltd. in the Province of Ontario, save and except office staff and those above the rank of working foreman.” (28 employees in unit). (*Clarity Note*). (*Granted*).

Number of names of persons on revised voters’ list		32
Number of persons who cast ballots	26	
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		22

0333-86-R: Corwin Vanderwal - on behalf of Himself and a Group of Employees, (Applicant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 879, (Respondent) v. Canlub Ltd. (c.o.b. as Mr. Lube Truck Centre), (Intervener). (6 employees in unit). (*Granted*).

0334-86-R: John Trevithick, self employed as Beam Electric Co. Limited, (Applicant) v. Electrical Contractors Association I.B.E.W., Local 353, (Respondent). (1 employee in unit). (*Withdrawn*).

0338-86-R: Fran Drury, (Applicant) v. Local 280 of the International Beverage Dispensers and Bartenders Union of the Hotel and Restaurant Employees and Bartenders International Union, (Respondent) v. Black Swan Tavern, (Intervener).

Unit: “all full-time and part-time male and female employees employed in the beverage departments in the Black Swan Tavern located at 154 Danforth Ave., in the Municipality of Toronto, Ontario listed as tapmen, bartenders, beverage waiters (including waiters who operate automatic beer dispensing equipment) bar boys and improvers and any other new classification relating to the service of alcoholic beverages.” (6 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		5

0342-86-R: Brigitte Fournier, on behalf of a group of employees of Hawkesbury Villa, (Applicant) v. Canadian Union of Public Employees, Local 2904, (Respondent) v. Hawkesbury Villa, (Intervener). (58 employees in unit). (*Dismissed*).

0343-86-R: Diane Raymond, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. Hawkesbury Villa, (Intervener). (58 employees in unit). (*Dismissed*).

0344-86-R: Johanne Plante, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. Hawkesbury Villa, (Intervener). (58 employees in unit). (*Dismissed*).

0345-86-R: Robert Wigelsworth for a Group of Employees, (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 593, (Respondent) v. J. B. Allen & Company Ltd., c.o.b. Ideal Plumbing Supplies, (Intervener). (7 employees in unit). (*Granted*).

0346-86-R: Peoples Store #27, (Applicant) v. U.F.C.W. Local 206, (Respondent). (10 employees in unit). (*Dismissed*).

0352-86-R: Harbourfront Corporation, (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto, (Respondent). (*Withdrawn*).

0593-86-R: Laura Turner, (Applicant) v. The Brewery, Malt and Soft Drink Workers, Local 304, (Respondent) v. Canada Trustco Mortgage Company, (Intervener). (*Granted*).

0603-86-R: Tim Babiak, (Applicant) v. The United Steelworkers of America, (Respondent). (*Granted*).

0845-86-R: Employees of W. R. McRae Company Ltd., (Applicant) v. Retail, Wholesale and Department Store Union, (Respondent) v. W. R. McRae Company Ltd., (Employer). (*Granted*).

0861-86-R: Ralston Edwards, Archille Lamarche, Daniel Murphey, Scott Hindshaw, Glenn Law, Raymond Summers, Joseph Bampton, John Paine and Jeff Fenton, (Applicants) v. International Union of Operating Engineers and its Local 796 and Citicom Inc., (Respondent). (*Withdrawn*).

REFERRAL TO APPOINTMENT OF CONCILIATION OFFICER

0378-86-M: Outdoor Outfits Ltd., (Employer) v. United Garment Workers of America, Local 253, (Trade Union). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0860-86-U: Metropolitan Plumbing and Heating Contractors Association, A Division of the Mechanical Contractors Association Toronto, (Applicant) v. Sean O'Ryan; The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46; Urban Mechanical Contractors Limited; Zentil Plumbing and Heating Co. Ltd.; Lou Pupolin Plumbing & Heating Co. Ltd.; Brady & Seidner Ltd.; DiMarco Plumbing & Heating Co. Ltd.; Keele Plumbing & Heating Ltd.; Municipal Plumbing & Heating Ltd., (Respondents). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1571-83-U; 1658-83-U: Rocco Dicognito, Donal Y. Hsu, Louie Savoia, Wolfgang Hauffe, Robert Proulx, Wray Carter, Andy Giamos, and the other persons listed on Schedule "A" to the complaint in File No. 1571-83-U, (Complainants) v. Local 414, Retail, Wholesale and Department Store Union, Roy Higson, Dan Garvey, Wayne Barrett, Mike Hunt, John Hudson, and Dominion Stores Limited, (Respondents). (*Dismissed*).

2447-84-U: Walter Sladich, (Applicant) v. Labourers' International Union of North America, Local 1036, (Respondent). (*Withdrawn*).

2903-84-U: Rocco Dicognito, Allan Dixon, and Mike Baldessara, (Complainants) v. Local 414, Retail, Wholesale and Department Store Union, Roy Higson, Dan Garvey, Wayne Barrett, Mike Hunt, John Hudson, and Dominion Stores Limited, (Respondents). (*Dismissed*).

0385-85-U: Robert Robinson, (Complainant) v. Toronto Printing Pressman and Assistants' Union No. 10, (Respondent) v. Ronalds Printing, Richmond Hill, (Intervener). (*Dismissed*).

0597-85-U: Jean Liebman, (Complainant) v. York University Staff Association, (Respondent) v. York University, (Intervener). (*Granted*).

1097-85-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Formula Plastics Inc., (Respondent). (*Dismissed*).

1152-85-U: Labourers' International Union of North America, Local 1059, (Complainant) v. 340480 Ontario Limited, c.o.b. as Concrete Forming (1980) and Concrete Forming (London) Limited, (Respondents). (*Withdrawn*).

1312-85-U: Christian Labour Association of Canada, (Complainant) v. Ceby Management Limited operating as Aurora Resthaven Extended Care & Convalescent Centre, (Respondent). (*Granted*).

1336-85-U: International Ladies' Garment Workers' Union, (Complainant) v. Russell H. Morin Products (1983) Ltd., (Respondent). (*Granted*).

1413-85-U: Canadian Union of Public Employees, (Complainant) v. Dundas Manor Limited, (Respondent). (*Withdrawn*).

1694-85-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351, (Complainant) v. The Young Manufacturer Inc., (Respondent). (*Granted*).

2046-85-U: United Steelworkers of America, (Complainant) v. Terra Footwear Limited, (Respondent) v. Group of Employees, (Objectors). (*Granted*).

2232-85-U: International Union of Bricklayers and Allied Craftsmen, Local 3, (Complainant) v. Dejayko Masonry Limited, (Respondent). (*Granted*).

2261-85-U: Robert Maxwell Leger, (Complainant) v. The United Steelworkers of America, Local 5475, (Respondent) v. Dresser Canada Inc., (Intervener). (*Dismissed*).

2278-85-U: Ontario Nurses' Association, (Complainant) v. Sudbury General Hospital of the Immaculate Heart of Mary and The Ontario Health Association, (Respondent). (*Withdrawn*).

2279-85-U: Ontario Nurses' Association, (Complainant) v. Sudbury Memorial Hospital and Ontario Hospital Association, (Respondent). (*Withdrawn*).

2280-85-U: Ontario Nurses' Association, (Complainant) v. Kirkland & District Hospital and Ontario Hospital Association, (Respondent). (*Withdrawn*).

2409-85-U: Canadian Paperworkers' Union, (Complainant) v. W. H. Smith Canada Ltd., (Respondent). (*Withdrawn*).

2945-85-U: Canadian Paperworkers' Union, (Complainant) v. W. H. Smith Ltd., (Respondent). (*Withdrawn*).

3081-85-U: Ontario Public Service Employees Union, (Complainant) v. Corbrook Sheltered Workshop and Scarbrook Enterprises, (Respondent). (*Withdrawn*).

3097-85-U: Paul Roger Boucher, (Complainant) v. The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (U.A.W.) Local 525, (Respondent). (*Dismissed*).

3149-85-U: Ontario Nurses' Association, (Complainant) v. Welland County General Hospital and Ontario Hospital Association, (Respondent). (*Withdrawn*).

3191-85-U: Ontario Nurses' Association, (Complainant) v. Kingston General Hospital and Ontario Hospital Association, (Respondent). (*Withdrawn*).

0031-86-U: The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainant) v. J. Steenbakkens Lumbers Co. Ltd./Capital Roof Truss (1984) Ltd., (Respondent). (*Withdrawn*).

0037-86-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, (Complainant) v. Starways Distributors, a division of Harlequin Enterprises Limited, (Respondent). (*Withdrawn*).

0047-86-U: Ontario Nurses' Association, (Complainant) v. Royal Victoria Hospital and Ontario Hospital Association, (Respondent). (*Withdrawn*).

0132-86-U: William E. Oates, (Complainant) v. Teamsters Union Local 230, (Respondent). (*Withdrawn*).

0214-86-U: Ontario Nurses' Association, (Complainant) v. The Doctor Joseph O. Ruddy General Hospital, (Respondent). (*Withdrawn*).

0228-86-U: The Southern Ontario Newspaper Guild, Local 87 of the Newspaper Guild, (Complainant) v. The Spectator (A Division of Southam Inc.), (Respondent). (*Withdrawn*).

0229-86-U: Leonard Finnigan, (Complainant) v. United Steelworkers of America AFL-CIO-CLC Local 6976, (Respondent). (*Withdrawn*).

0259-86-U: Rick Bene, (Complainant) v. International Brotherhood of Painters and Allied Trade District Council 46, (Respondent) v. 383941 Ontario Ltd., (Intervener). (*Dismissed*).

0267-86-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. TDL Wood-treating Limited, (Respondent). (*Withdrawn*).

0312-86-U: Great Lakes Fishermen and Allied Workers' Union, Domingo Bello, Jose Gandaio, (Applicants) v. Lake Erie Foods Inc. et al, (Respondents). (*Withdrawn*).

0313-86-U: Great Lakes Fishermen and Allied Workers' Union, Domingo Bello, Jose Gandaio, (Complainants) v. Lake Erie Foods Inc. et al., (Respondents). (*Withdrawn*).

0318-86-U: Service Employees Union - Local 210, (Complainant) v. Bruce Rest Home AKA Bruce Retirement Villa, Michael Guiley, Shirley Guiley, (Respondent). (*Withdrawn*).

0319-86-U: Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation No. 46, (Respondent). (*Withdrawn*).

0330-86-U: G.B.F. Forging Specialists Co., (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 397, (Respondent). (*Withdrawn*).

0367-86-U: United Food and Commercial Workers International Union, Local 175, (Complainant) v. Comfort Inn, (Respondent). (*Withdrawn*).

0374-86-U: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, (Complainant) v. Lorne Goodman Plumbing & Heating Ltd., (Respondent). (*Withdrawn*).

0377-86-U: Hotel Employees and Restaurant Employees Union, Local 75, (Complainant) v. Chimo Hotel, (Respondent). (*Withdrawn*).

0396-86-U: Labourers' International Union of North America, Local 1036, (Complainant) v. Crema Furniture Limited, (Respondent). (*Withdrawn*).

0398-86-U: Saverio Ranieri, (Complainant) v. American Federation of Grant Millers, (Respondent) v. Thomas J. Lipton Inc., (Intervener). (*Dismissed*).

0411-86-U: United Food & Commercial Workers International Union, (Complainant) v. Delft Blue Farms Inc., Grober Farms Ltd., Grodell Foods Ltd., (Respondent). (*Withdrawn*).

0475-86-U: Guido Biocca, (Complainant) v. Ontario Hydro, (Respondent) v. The Society of Ontario Hydro Professional and Administrative Employees, (Intervener). (*Withdrawn*).

0562-86-U: Retail, Wholesale & Department Store Union AFL-CIO-CLC, (Complainant) v. T. Eaton Company Limited, (Respondent). (*Withdrawn*).

0628-86-U: Ontario Public Service Employees Union, (Complainant) v. St. Andrew's Centennial Manor a division of Swiss Nursing Homes Inc., (Respondent). (*Withdrawn*).

0630-86-R: Canadian Paperworkers' Union, (Applicant) v. W. H. Smith Limited, (Respondent). (*Withdrawn*).

0671-86-U: Kathleen Holmes, (Complainant) v. Local 2001 - Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

0675-86-U: Canadian Union of Public Employees, (Complainant) v. Dufferin Association for the Mentally Retarded, (Respondent). (*Withdrawn*).

0679-86-U: R.L.D. Electric, a division of 618830 Ontario Limited, (Complainant) v. International Brotherhood of Electrical Workers, Local 353 and Mike Lloyd, (Respondents). (*Granted*).

0712-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Kora Mechanical Inc., (Respondent). (*Withdrawn*).

0751-86-U: Shawn Wade, (Complainant) v. Spun Steel Ltd., (Respondent). (*Withdrawn*).

0752-86-U: Canadian Union of Public Employees and its Local 1974, (Complainant) v. Kingston General Hospital, (Respondent). (*Withdrawn*).

0774-86-U: Peter Kunkel, (Complainant) v. Mike Lloyd "Business Rep" of the International Brotherhood of Electrical Workers, Local 353, (Respondent). (*Withdrawn*).

0786-86-U: Amalgamated Clothing and Textile Workers' Union, (Complainant) v. Elco Kitchen Products Ltd., (Respondent). (*Withdrawn*).

0787-86-U: Ontario Nurses' Association, (Complainant) v. Hanover and District Hospital, (Respondent). (*Withdrawn*).

0838-86-U: Sandra Empey, (Complainant) v. Dundas Manor Ltd., (Respondent). (*Withdrawn*).

0859-86-U: Violet Toth, (Complainant) v. Fred Major, Stella Romaniuk, Steve Sherrit, Bill Crosby, Ethel Dawson, (Respondents). (*Dismissed*).

0880-86-U: International Association of Machinists & Aerospace Workers, Local 1788, (Complainant) v. Bata Industries Limited, (Respondent). (*Withdrawn*).

0884-86-U: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Walker Atlantic Glass Co. Ltd., (Respondent). (*Withdrawn*).

0905-86-U: Union of Bank Employees Local 2104 (Ontario) CLC, (Complainant) v. Heritage Credit Union, (Respondent). (*Withdrawn*).

0917-86-U: Canadian Brotherhood of Railway, Transport and General Workers, (Complainant) v. Aatel Communications Inc., (Respondent). (*Withdrawn*).

0925-86-U: Everette Chapelle, (Complainant) v. Amalgamated Transit Union, Local 113, (Respondent). (*Withdrawn*).

0961-86-U: Southern Ontario Newspaper Guild, and Local 87, The Newspaper Guild, (Complainant) v. Metroland Printing, Publishing and Distributing, a Division of Harlequin Enterprises Limited, (Respondent). (*Withdrawn*).

1005-86-U: York Condominium Corporation No. 46, (Complainant) v. Labourers' International Union of North America, Local 183, (Respondent). (*Withdrawn*).

1199-86-U: Kingston Carpenter Local 249, (Complainant) v. The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Dismissed*).

1212-86-U: Residence St. Francois, (Complainant) v. Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

0541-86-M: Janice Anne Karr, (Applicant) v. London and District Service Workers' Union, Local 220, (Respondent Trade Union) v. Craigholme Nursing Home, (Respondent Employer). (*Granted*).

0619-86-M: Betty Gill, (Applicant) v. London and District Service Workers Union, Local 220, (Respondent Trade Union) v. Craigholme Nursing Home, (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3135-85-M: National Grocers Co. Ltd., (Employer) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 880, 879, 419, 91 and 106, (Trade Union). (*Granted*).

0550-86-M: The Canadian Union of Public Employees & its Local 265, (Applicant) v. Jewish Family & Child Service of Metropolitan Toronto, (Respondent). (*Withdrawn*).

0721-86-M: Corporation of the Township of Loughborough, (Employer) v. Labourers' International Union of North America, Local 247, (Trade Union). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0292-86-M: The Regional Municipality of Peel, (Peel Manor and Sheridan Villa Homes for the Aged), (Applicant) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*).

0388-86-M: Victoria Hospital Corporation, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

2956-85-M: Canadian Union of Public Employees and its Local 2721, (Applicant) v. Yorklea Childrens Lodge, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0216-86-OH: Tom Boldt, (Complainant) v. Playtex Ltd., (Respondent). (*Dismissed*).

0484-86-OH: Scott Allan Henry, (Complainant) v. Job-Site Custom Coach Limited, (Respondent). (*Withdrawn*).

0528-86-OH: Bob McArthur UAW 195, Member Canadian Salt Company, (Complainant) v. G. MacInnis General Foreperson Maintenance Dept. on behalf of Canadian Salt Company, (Respondent). (*Withdrawn*).

0858-86-OH: A. Levac, (Complainant) v. MacMillan Bloedel Ltd., (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

2932-85-U: A. K. Stuart, (Complainant) v. Ontario Public Service Employees Union Local 560, (Respondent). (*Dismissed*).

CONSTRUCTION INDUSTRY GRIEVANCES

0689-81-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. General Contractors Association of Hamilton, Labour Relations Bureau of the Ontario General Contractors Association, Acoustical Association of Ontario, Resilient Flooring Contractors Association of Ontario, Caulking Association of Ontario, Industrial Contractors Association of Canada and Interior Systems Contractors of Ontario, (Respondents) v. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, (Intervener). (*Dismissed*).

1285-85-M: Labourers' International Union of North America, Local 493, (Applicant) v. Lacroix Construction Co. Ltd., (Respondent). (*Withdrawn*).

1590-85-M: International Union of Operating Engineers, Local 793, (Applicant) v. Bot Construction (Canada) Limited, (Respondent). (*Withdrawn*).

2367-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. The Metropolitan Toronto Apartment Builders Association and Belmont Construction Co. Ltd., (Respondents). (*Withdrawn*).

2527-85-M: Ontario Allied Construction Trades Council and L.I.U.N.A., Local 597, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro-Darlington G.S., (Respondent). (*Dismissed*).

2852-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. The Metropolitan Toronto Apartment Builders Association and Belmont Construction Co. Ltd., (Respondents). (*Withdrawn*).

2917-85-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Daybue Contracting Ltd., (Respondent). (*Withdrawn*).

3060-85-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. Transway Steel Buildings Limited, (Respondent). (*Granted*).

3103-85-M; 0693-86-M: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Drycoustic Construction Limited, (Respondent). (*Granted*).

3146-85-M: The Formwork Council of Ontario and the Labourers International Union of North America, Local 183, (Applicant) v. Kadd Construction Ltd., (Respondent). (*Granted*).

3208-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. The Metropolitan Toronto Apartment Builders Association and Goldlist Construction Ltd., (Respondents). (*Withdrawn*).

0425-86-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7 Canada, (Applicant) v. Durie Tile & Terrazzo Ltd., (Respondent). (*Granted*).

0455-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Three J. Display & Woodworking Enterprises Ltd., (Respondent). (*Granted*).

0569-86-M: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128, (Applicant) v. Rollins Steel Services Ltd., (Respondent). (*Granted*).

0608-86-M: Labourers' International Union of North America, Local 247, (Applicant) v. M. Sullivan and Son, (Respondent). (*Granted*).

0629-86-M: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. 618830 Ontario Limited c.o.b. as R.L.D. Electric, (Respondent). (*Granted*).

0669-86-M: Local 200 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Mike Braovac Painting, (Respondent). (*Granted*).

0693-86-M: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Drycoustic Construction Limited, (Respondent). (*Granted*).

0703-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Cesaroni Brothers Ltd., (Respondent). (*Granted*).

0718-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Special Foundation Systems Co., (Respondent). (*Granted*).

0778-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Bluebell Underground Inc., (Respondent). (*Withdrawn*).

0783-86-M: Office & Professional Employees International Union Local 81 Thunder Bay, Ontario, (Applicant) v. Cochrane-Dunlop Limited Thunder Bay, Ontario, (Respondent). (*Withdrawn*).

0799-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Visp Construction Co., (Respondent). (*Withdrawn*).

0801-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Batoni Construction Inc., (Respondent). (*Withdrawn*).

0804-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Aberdeen Highlands Construction Ltd., (Respondent). (*Withdrawn*).

0805-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. V.B.N. Construction Ltd., (Respondent). (*Withdrawn*).

0806-86-M: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. G. W. Painting Ltd., (Respondent). (*Withdrawn*).

0813-86-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Thermo Tech Insulation Ltd., (Respondent). (*Granted*).

0817-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Devon Structural Ltd., (Respondent). (*Withdrawn*).

0818-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. i) Victoria Wood Development Corp., ii) Toronto Housing Labour Bureau, (Respondents). (*Withdrawn*).

0855-86-M: United Brotherhood of Carpenters & Joiners of America Local 494, (Applicant) v. Meret Construction Inc., (Respondent). (*Granted*).

0874-86-M: Labourers' International Union of North America, Local 527, (Applicant) v. Schokbeton Quebec Inc., (Respondent). (*Granted*).

0875-86-M: Labourers' International Union of North America, Local 527, (Applicant) v. Ottawa Carleton Bricklaying and Masonry, (Respondent). (*Granted*).

0877-86-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. Ram Mechanical Contractors Limited, (Respondent). (*Withdrawn*).

0898-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Helmut Kruschat Construction, (Respondent). (*Granted*).

0899-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. Lindall Excavating Ltd., (Respondent). (*Withdrawn*).

0900-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. E & E Seegmiller Limited, (Respondent). (*Withdrawn*).

0906-86-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. N. L. Smith Construction Group Inc., Nordal Construction Limited, (Respondent). (*Withdrawn*).

0908-86-M: Labourers' International Union of North America Local 527, (Applicant) v. Denis Brisbois Contractor Ltd. and Gloucester Utilities Contractor Ltd., (Respondents). (*Granted*).

0909-86-M: Labourers' International Union of North America, Local 597, (Applicant) v. Tantalus Construction Co. Ltd., (Respondent). (*Granted*).

0910-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 800, (Applicant) v. Northway Industries Ltd., (Respondent). (*Withdrawn*).

0913-86-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Carmen Drywall, (Respondent). (*Withdrawn*).

0945-86-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 700, (Applicant) v. Staats Steeplejacks, (Respondent). (*Granted*).

0946-86-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, (Applicant) v. Nebraska Steel Limited, (Respondent). (*Granted*).

0949-86-M: Ontario Allied Construction Trades council and its Affiliate International Union of Operating Engineers and its Local 793, (Applicant) v. Electrical Power Systems Contractors Association and Ontario Hydro, Darlington Generating Station, (Respondent). (*Withdrawn*).

0957-86-M: International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicants) v. Architectural Glass and Metal Contractors Association, Canadian Glass, Division of Fordglass Ltd., Ford Glass Limited and PPG Canada Inc., (Respondents). (*Granted*).

0976-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Skyway Equipment Company, (Respondent). (*Withdrawn*).

0991-86-M: United Brotherhood of Carpenters' and Joiners of America, Local Union 27, (Applicant) v. Antinori Building Contractor Inc., (Respondent). (*Withdrawn*).

0993-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Victoria Carpentry Ltd., (Respondent). (*Withdrawn*).

0994-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. J. D. Caulking Limited, (Respondent). (*Withdrawn*).

1012-86-M: Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, Local 205, (Applicant) v. J & A Decorating & Painting Ltd., (Respondent). (*Withdrawn*).

1187-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. San-Lee Construction Limited, (Respondent). (*Granted*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2249-84-JD: Labourers' International Union of North America Local 1036, (Complainant) v. Bird Construction Company Limited United Brotherhood of Carpenters and Joiners of America Local 446 Gilbert Scott and Gerry Thibodeau, (Respondents). (*Denied*).

0630-85-U: Richard B. James, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 444 and Chrysler Canada Limited, (Respondent). (*Denied*).

0917-85-OH: Theresa Russ, Elaine Jennings, Kelly Shields and Carole Matthewson, (Complainants) v. Cody's Stores Ltd., (Respondent). (*Denied*).

0115-86-R: Labourers' International Union of North America, Local 1036, (Applicant) v. Crema Furniture Limited, (Respondent). (*Denied*).

0156-86-R: Labourers' International Union of North America Local 527, (Applicant) v. Colibri Construction Inc., (Respondent). (*Denied*).

*Ontario Labour Relations Board,
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ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1986



CASES REPORTED

1.	Allan G. Cook Limited; Re International Union of Operating Engineers, Local 793; Re Group of Employees	1175
2.	Belleville Plaza; Re Craig Scurr; Re Service Employees Union, Local 183; Re Group of Employees	1179
3.	Brant County Board of Education; Re Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen	1187
4.	Cambrian College of Applied Arts and Technology; Re O.P.S.E.U.	1190
5.	Carleton Roman Catholic Separate School Board; Re Ontario Catholic Occasional Teachers' Association	1200
6.	City Plumbing (Kitchener) Limited; Re Richard Grandy; Re Ontario Pipe Trades Council of the U.A., Local 527	1206
7.	DRG Inc.; Re Canadian Paperworkers Union; Re Group of Employees.....	1210
8.	F. Causarano Fishery Limited; Re Great Lakes Fishermen and Allied Workers' Union	1214
9.	Fleetwide, 608379 Ontario Inc. o/a; Re Teamsters Union, Local 880.....	1216
10.	General Hospital of Port Arthur and Ontario Hospital Association; Re O.N.A.....	1218
11.	Grand & Toy Limited; Re United Steelworkers of America; Re Graphic Communications International Union, Local 500-M; Re Group of Employees	1223
12.	Kitchener Beverages Limited; Re Canadian Union of United Brewery, Flour, Cereal, Soft Drink Workers; Re Group of Employees.....	1234
13.	Klimack Construction Limited; Re Labourers' Union, Local 491; Re Group of Employees.	1238
14.	Lawrence, Ron; Re U.E., Local 120.....	1241
15.	Metropolitan Plumbing and Heating Contractors Association, Frank Michelucci, et al.; Re Sean O'Ryan, U.A., Local 46, Metropolitan Plumbing Contractors Association, Urban Mechanical Contractors Association, Zentil Plumbing and Heating Co. Ltd., et al.....	1252
16.	Metropolitan Separate School Board; Re C.U.P.E.; Re O.P.S.E.U.; Re Ontario English Catholic Teachers Association	1259
17.	Mr. Grocer, Willett Foods Limited, c.o.b. as, Domgroup Ltd., Hollinger Inc., Conrad Black; Re R.W.D.S.U., Local 414; Re Termarg Food Services Limited, et al.	1276
18.	Nepean Roof Truss Ltd.; Re Floyed Ryan Deschamps; Re Carpenters Union, Local 1030..	1279
19.	Nepean Roof Truss Ltd.; Re Carpenters Union, Local 1030.....	1287
20.	Ottawa-Carleton Bricklaying and Masonry Limited; Re Carpenters Union, Local 93 and Richard Restall	1299
21.	Resco Chemicals & Colours Ltd.; Re Teamsters Chemical Energy & Allied Workers Union, Local 424; Re Group of Employees	1301
22.	S. Catrini Fisheries Inc.; Re Great Lakes Fishermen and Allied Workers' Union.....	1306

23.	Somerville Belkin Industries Limited; Re Canadian Paperworkers' Union, Locals 36, 311 and 1112	1307
24.	Steve's Sheet Metal Company, S.N. Ventilation Heating Limited, c.o.b. as; Re Sheet Metal Workers International Association, Local 537	1309
25.	Trim Trends Canada Limited; Re United Steelworkers of America; Re Group of Employees	1312
26.	Twin Electric and Ermac Power & Control Ltd.; Re International Brotherhood of Electrical Workers, Local 303	1320
27.	Winchester District Memorial Hospital; Re O.N.A.; Re Group of Employees	1323

SUBJECT INDEX

- Accreditation - Evidence - Practice and Procedure - Whether present panel of Board will review 1973 decision of another panel to issue accreditation certificate - Whether evidence relating to conversations with a mediator admissible
- METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION, FRANK MICHELUCCI, ET AL.; RE SEAN O'RYAN, U.S.A, LOCAL 46, METROPOLITAN PLUMBING CONTRACTORS ASSOCIATION, URBAN MECHANICAL CONTRACTORS LIMITED, ZENTIL PLUMBING AND HEATING CO. LTD., ET AL. 1252
- Adjournment - Practice and Procedure - Termination - Several s.89 complaints pending before Board - Board declining to postpone consideration of timely termination application pending disposition of earlier complaints - Whether a prior defective statement of desire will taint one subsequently filed
- NEPEAN ROOF TRUSS LTD.; RE FLOYED RYAN DESCHAMPS; RE CARPENTERS UNION, LOCAL 1030 1279
- Arbitration - Evidence - Practice and Procedure - Motion to dismiss complaint without hearing dismissed - Whether Board should defer to grievance arbitration - Board discussing adequacy of particulars in complaints
- GENERAL HOSPITAL OF PORT ARTHUR AND ONTARIO HOSPITAL ASSOCIATION; RE O.N.A. 1218
- Bargaining Unit - Certification - Reconsideration - Existence of part-time employees not disclosed to Board - Part-time employees swept into bargaining unit when unit defined in tag-end terms - Unit redefined on reconsideration
- RESCO CHEMICALS & COLOURS LTD.; RE TEAMSTERS CHEMICAL ENERGY & ALLIED WORKERS UNION, LOCAL 424; RE GROUP OF EMPLOYEES..... 1301
- Bargaining Unit - Certification - Union seeking unit of full-time Heritage Language Instructors - Board surveying practice in defining units in education sector - Whether practice of separating full- and part-time employees applicable
- METROPOLITAN SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE O.P.S.E.U.; RE ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION 1259
- Bargaining Unit - Pre-hearing Vote - Disagreement about bargaining unit description for purposes of pre-hearing vote - Board not obliged to define voting constituency so as to cover units proposed by both parties - Whether determination under s.9(2) should be delayed pending notice of application to affected employees
- CARLETON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION 1200
- Certification - Bargaining Unit - Reconsideration - Existence of part-time employees not disclosed to Board - Part-time employees swept into bargaining unit when unit defined in tag-end terms - Unit redefined on reconsideration
- RESCO CHEMICALS & COLOURS LTD.; RE TEAMSTERS CHEMICAL ENERGY & ALLIED WORKERS UNION, LOCAL 424; RE GROUP OF EMPLOYEES..... 1301
- Certification - Bargaining Unit - Union seeking unit of full-time Heritage Language Instructors -

II

Board surveying practice in defining units in education sector - Whether practice of separating full- and part-time employees applicable	
METROPOLITAN SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE O.P.S.E.U.; RE ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION	1259
Certification - Constitutional Law - Respondent hauling goods for manufacturer but not a licensed carrier nor involved in manufacturing itself - Respondent found to be delivery arm of manufacturer - Operation integral part of manufacturing concern and therefore within provincial jurisdiction	
FLEETWIDE, 608379 ONTARIO INC. O/A; RE TEAMSTERS UNION, LOCAL 880 ..	1216
Certification - Construction Industry - Board not engaging in inquiry to review geographic boundaries of Board area #19 - Determination of trade when time split between labourer and operating engineer	
KLIMACK CONSTRUCTION LTD.; RE LABOURERS' UNION, LOCAL 491; RE GROUP OF EMPLOYEES	1238
Certification - Employee - Exhibits introduced by employer to show worker had access to confidential information - All confidential information whited out - Board unable to determine content of documents - Onus on party seeking exclusion of individuals from bargaining unit	
DRG INC.; RE CANADIAN PAPERWORKERS UNION; RE GROUP OF EMPLOYEES	1210
Certification - Membership Evidence - Chief union organizer directing other organizers not to use two-tier initiation fee as organizing tool - Whether employees misled about effect of different initiation fees	
TRIM TRENDS CANADA LTD.; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES	1312
Certification - Membership Evidence - Irregularities in membership evidence disclosed by union in Form 9 declaration - Employer challenging secrecy of union membership evidence - Board reviewing purpose of Form 9 and policy of not allowing employer to inspect membership evidence	
GRAND & TOY LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 500-M; RE GROUP OF EMPLOYEES	1223
Certification - Practice and Procedure - Pre-hearing Vote - Blank Form 9 not preventing Board from acting on appearance of membership evidence to direct pre-hearing vote - Board discussing its role in pre-hearing vote applications	
F. CAUSARANO FISHERY LTD.; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION	1214
Certification - Settlement - Settlement concerning status of disputed individuals not signed by objecting employees who had intervener status - Fact that objecting employees not examined by Labour Relations Officer not rendering settlement void - Final certificate revoked pending Officer meeting with employees	
WINCHESTER DISTRICT MEMORIAL HOSPITAL; RE O.N.A.; RE GROUP OF EMPLOYEES	1323
Colleges Collective Bargaining Act - Intimidation and Coercion - Unfair Labour Practice - Can-	

cellation of courses taught by full-time faculty in extension program during legal strike not tainted by anti-union motive - Absence of reverse onus in CCBA

CAMBRIAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. 1190

Constitutional Law - Certification - Respondent hauling goods for manufacturer but not a licensed carrier nor involved in manufacturing itself - Respondent found to be delivery arm of manufacturer - Operation integral part of manufacturing concern and therefore within provincial jurisdiction

FLEETWIDE, 608379 ONTARIO INC. O/A; RE TEAMSTERS UNION, LOCAL 880 .. 1216

Construction Industry - Certification - Board not engaging in inquiry to review geographic boundaries of Board area #19 - Determination of trade when time split between labourer and operating engineer

KLIMACK CONSTRUCTION LTD.; RE LABOURERS' UNION, LOCAL 491; RE GROUP OF EMPLOYEES 1238

Construction Industry Grievance - Damages - Whether genuine sub-contract or attempt to avoid collective agreement - Board considering employer's good faith in making sub-contract arrangement and union's knowledge - Refusing to go behind "sub-contract" in particular circumstances - Damages assessed for hours lost by union members

STEVE'S SHEET METAL CO., S.N. VENTILATION HEATING LIMITED, C.O.B. AS; RE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 537 1309

Construction Industry Grievance - Employer - Respondent hiring person to oversee masonry restoration - Applicant arguing *res judicata* on issue of whether respondent an "employer" in the construction industry based on previous case - Distinction between "owner" or "purchaser" and "employer" in construction industry discussed

BRANT COUNTY BOARD OF EDUCATION; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN 1187

Construction Industry Grievance - Union steward dismissed following verbal exchange with management on construction site - Union steward having right to challenge authority of management - Grievance allowed

OTTAWA-CARLETON BRICKLAYING AND MASONRY LTD.; RE CARPENTERS UNION, LOCAL 93 AND RICHARD RESTALL 1299

Damages - Construction Industry Grievance - Whether genuine sub-contract or attempt to avoid collective agreement - Board considering employer's good faith in making sub-contract arrangement and union's knowledge - Refusing to go behind "sub-contract" in particular circumstances - Damages assessed for hours lost by union members

STEVE'S SHEET METAL CO., S.N. VENTILATION HEATING LIMITED, C.O.B. AS; RE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 537 1309

Duty of Fair Referral - Unfair Labour Practice - "Two-job" rule in hiring hall applied to complainant but not travellers - Whether systemic discrimination breach of s.69 - Cogent labour relations purpose test applied prior to finding of discrimination

LAWRENCE, RON; RE U.E., LOCAL 120 1241

Employee - Certification - Exhibits introduced by employer to show worker had access to confi-

IV

dential information - All confidential information whited out - Board unable to determine content of documents - Onus on party seeking exclusion of individuals from bargaining unit	
DRG INC.; RE CANADIAN PAPERWORKERS UNION; RE GROUP OF EMPLOYEES	1210
Employer - Construction Industry Grievance - Respondent hiring person to oversee masonry restoration - Applicant arguing <i>res judicata</i> on issue of whether respondent an "employer" in the construction industry based on previous case - Distinction between "owner" or "purchaser" and "employer" in construction industry discussed	
BRANT COUNTY BOARD OF EDUCATION; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN	1187
Evidence - Accreditation - Practice and Procedure - Whether present panel of Board will review 1973 decision of another panel to issue accreditation certificate - Whether evidence relating to conversations with a mediator admissible	
METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION, FRANK MICHELUCCI, ET AL.; RE SEAN O'RYAN, U.A., LOCAL 46, METROPOLITAN PLUMBING CONTRACTORS ASSOCIATION, URBAN MECHANICAL CONTRACTORS LIMITED, ZENTIL PLUMBING AND HEATING CO. LTD., ET AL.	1252
Evidence - Arbitration - Practice and Procedure - Motion to dismiss complaint without hearing dismissed - Whether Board should defer to grievance arbitration - Board discussing adequacy of particulars in complaints	
GENERAL HOSPITAL OF PORT ARTHUR AND ONTARIO HOSPITAL ASSOCIATION; RE O.N.A.	1218
Evidence - Related Employer - Sale of a Business - Earlier panel directing respondent to produce evidence material to application - Witnesses called by respondent giving no direct evidence concerning formation of respondent - Hearsay evidence failing to comply with Board direction - Further direction to tender evidence	
SOMERVILLE BELKIN INDUSTRIES LIMITED; RE CANADIAN PAPERWORKERS' UNION, LOCALS 36, 311 AND 1112	1307
First Contract Arbitration - Interest Arbitration - Reconsideration - Timeliness - Panel refusing to reconsider direction to settle first collective agreement made by original panel - Board failing to comply with time limits in s.40a(4) - Time limits directory only - Employer not appearing nor filing any documents - Board not bound to accept unwritten understanding as basis for contract terms - Agreement between union and related employer used as model for collective agreement	
NEPEAN ROOF TRUSS LTD.; RE CARPENTERS UNION, LOCAL 1030	1287
Interest Arbitration - First Contract Arbitration - Reconsideration - Timeliness - Panel refusing to consider direction to settle first collective agreement made by original panel - Board failing to comply with time limits in s.40a(4) - Time limits directory only - Employer not appearing nor filing any documents - Board not bound to accept unwritten understanding as basis for contract terms - Agreement between union and related employer used as model for collective agreement	
NEPEAN ROOF TRUSS LTD.; RE CARPENTERS UNION, LOCAL 1030	1287
Intimidation and Coercion - Colleges Collective Bargaining Act - Unfair Labour Practice - Can-	

cellation of courses taught by full-time faculty in extension program during legal strike not tainted by anti-union motive - Absence of reverse onus in CCBA

CAMBRIAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. 1190

Membership Evidence - Certification - Chief union organizer directing other organizers not to use two-tier initiation fee as organizing tool - Whether employees misled about effect of different initiation fees

TRIM TRENDS CANADA LTD.; RE UNITED STEELWORKERS OF AMERICA;
RE GROUP OF EMPLOYEES 1312

Membership Evidence - Certification - Irregularities in membership evidence disclosed by union in Form 9 declaration - Employer challenging secrecy of union membership evidence - Board reviewing purpose of Form 9 and policy of not allowing employer to inspect membership evidence

GRAND & TOY LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE
GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 500-M; RE
GROUP OF EMPLOYEES 1223

Membership Evidence - Union organizer discussing circulation of counter-petition with employees during membership drive - Union not required to call evidence of these discussions to prove origination and circulation of counter-petition

ALLAN G. COOK LIMITED; RE INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 793; RE GROUP OF EMPLOYEES 1175

Parties - Practice and Procedure - Service requirements in Practice Note 5 relaxed due to number of parties involved - Board practice for amending application or complaint to add a respondent set out

MR. GROCER, WILLETT FOODS LIMITED, C.O.B. AS, DOMGROUP LTD., HOL-
LINGER INC., CONRAD BLACK; RE R.W.D.S.U., LOCAL 414; RE TERMARG
FOOD SERVICES LIMITED ET AL. 1276

Petition - Termination - Whether events taking place months prior to actual origination and circulation of petition relevant to issue of voluntariness - Employer conduct not tainting petition

BELLEVILLE PLAZA; RE CRAIG SCURR; RE SERVICE EMPLOYEES UNION,
LOCAL 183; RE GROUP OF EMPLOYEES 1179

Practice and Procedure - Accreditation - Evidence - Whether present panel of Board will review 1973 decision of another panel to issue accreditation certificate - Whether evidence relating to conversations with a mediator admissible

METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION,
FRANK MICHELUCCI, ET AL.; RE SEAN O'RYAN, U.A., LOCAL 46, METRO-
POLITAN PLUMBING CONTRACTORS ASSOCIATION, URBAN MECHANICAL
CONTRACTORS LIMITED, ZENTIL PLUMBING AND HEATING CO. LTD., ET
AL. 1252

Practice and Procedure - Adjournment - Termination - Several s.89 complaints pending before Board - Board declining to postpone consideration of timely termination application pending disposition of earlier complaints - Whether a prior defective statement of desire will taint one subsequently filed

NEPEAN ROOF TRUSS LTD.; RE FLOYED RYAN DESCHAMPS; RE CARPEN-
TERS UNION, LOCAL 1030 1279

Practice and Procedure - Arbitration - Evidence - Motion to dismiss complaint without hearing

dismissed - Whether Board should defer to grievance arbitration - Board discussing adequacy of particulars in complaints	
GENERAL HOSPITAL OF PORT ARTHUR AND ONTARIO HOSPITAL ASSOCIATION; RE O.N.A.	1218
Practice and Procedure - Certification - Pre-hearing Vote - Blank Form 9 not preventing Board from acting on appearance of membership evidence to direct pre-hearing vote - Board discussing its role in pre-hearing vote applications	
F. CAUSARANO FISHERY LTD.; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....	1214
Practice and Procedure - Parties - Service requirements in Practice Note 5 relaxed due to number of parties involved - Board practice for amending application or complaint to add a respondent set out	
MR. GROCER, WILLETT FOODS LIMITED, C.O.B. AS, DOMGROUP LTD., HOLLINGER INC., CONRAD BLACK; RE R.W.D.S.U., LOCAL 414; RE TERMARG FOOD SERVICES LIMITED ET AL.	1276
Practice and Procedure - Pre-hearing Vote - Applicant failing to attend meeting with Labour Relations Officers - Applicant aware of meeting and given warning concerning non-attendance - Certification application dismissed	
S. CATRINI FISHERIES INC.; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....	1306
Practice and Procedure - Termination - Only one employee need exist to file termination application - Challenge to list untimely - Representation vote directed	
CITY PLUMBING (KITCHENER) LIMITED; RE RICHARD GRANDY; RE ONTARIO PIPE TRADES COUNCIL OF THE U.A., LOCAL 527	1206
Pre-hearing Vote - Bargaining Unit - Disagreement about bargaining unit description for purposes of pre-hearing vote - Board not obliged to define voting constituency so as to cover units proposed by both parties - Whether determination under s.9(2) should be delayed pending notice of application to affected employees	
CARLETON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION	1200
Pre-hearing Vote - Certification - Practice and Procedure - Blank Form 9 not preventing Board from acting on appearance of membership evidence to direct pre-hearing vote - Board discussing its role in pre-hearing vote applications	
F. CAUSARANO FISHERY LTD.; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....	1214
Pre-hearing Vote - Practice and Procedure - Applicant failing to attend meeting with Labour Relations Officers - Applicant aware of meeting and given warning concerning non-attendance - Certification application dismissed	
S. CATRINI FISHERIES INC.; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....	1306
Reconsideration - Bargaining Unit - Certification - Existence of part-time employees not disclosed to Board - Part-time employees swept into bargaining unit when unit defined in tag-end terms - Unit redefined on reconsideration	
RESCO CHEMICALS & COLOURS LTD.; RE TEAMSTERS CHEMICAL ENERGY & ALLIED WORKERS UNION, LOCAL 424; RE GROUP OF EMPLOYEES.....	1301

Reconsideration - First Contract Arbitration - Interest Arbitration - Timeliness - Panel refusing to reconsider direction to settle first collective agreement made by original panel - Board failing to comply with time limits in s.40a(4) - Time limits directory only - Employer not appearing nor filing any documents - Board not bound to accept unwritten understanding as basis for contract terms - Agreement between union and related employer used as model for collective agreement	
NEPEAN ROOF TRUSS LTD.; RE CARPENTERS UNION, LOCAL 1030	1287
Reconsideration - Representation Vote - Union waiting until ballots counted before raising allegations of employer misconduct - Discussion of circumstances when Board will entertain untimely objection to representation vote - Applicant unable to show cause why Board should reconsider its decision to dismiss certification application	
KITCHENER BEVERAGES LIMITED; RE CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK WORKERS; RE GROUP OF EMPLOYEES	1234
Related Employer - Evidence - Sale of a Business - Earlier panel directing respondent to produce evidence material to application - Witnesses called by respondent giving no direct evidence concerning formation of respondent - Hearsay evidence failing to comply with Board direction - Further direction to tender evidence	
SOMERVILLE BELKIN INDUSTRIES LIMITED; RE CANADIAN PAPERWORKERS' UNION, LOCALS 36, 311 AND 1112	1307
Related Employer - Sale of a Business - Application dismissed where no specific contract to acquire "key-man" services of an ongoing business - Key-man actually an employee in new company	
TWIN ELECTRIC AND ERMAC POWER & CONTROL LTD.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 303	1320
Representation Vote - Reconsideration - Union waiting until ballots counted before raising allegations of employer misconduct - Discussion of circumstances when Board will entertain untimely objection to representation vote - Applicant unable to show cause why Board should reconsider its decision to dismiss certification application	
KITCHENER BEVERAGES LIMITED; RE CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK WORKERS; RE GROUP OF EMPLOYEES	1234
Sale of a Business - Evidence - Related Employer - Earlier panel directing respondent to produce evidence material to application - Witnesses called by respondent giving no direct evidence concerning formation of respondent - Hearsay evidence failing to comply with Board direction - Further direction to tender evidence	
SOMERVILLE BELKIN INDUSTRIES LIMITED; RE CANADIAN PAPERWORKERS' UNION, LOCALS 36, 311 AND 1112	1307
Sale of a Business - Related Employer - Application dismissed where no specific contract to acquire "key-man" services of an ongoing business - Key-man actually an employee in new company	
TWIN ELECTRIC AND ERMAC POWER & CONTROL LTD.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 303	1320
Settlement - Certification - Settlement concerning status of disputed individuals not signed by objecting employees who had intervener status - Fact that objecting employees not exam-	

VIII

<p>ined by Labour Relations Officer not rendering settlement void - Final certificate revoked pending Officer meeting with employees</p> <p>WINCHESTER DISTRICT MEMORIAL HOSPITAL; RE O.N.A.; RE GROUP OF EMPLOYEES</p>	1323
<p>Termination - Adjournment - Practice and Procedure - Several s.89 complaints pending before Board - Board declining to postpone consideration of timely termination application pending disposition of earlier complaints - Whether a prior defective statement of desire will taint one subsequently filed</p> <p>NEPEAN ROOF TRUSS LTD; RE FLOYED RYAN DESCHAMPS; RE CARPENTERS UNION, LOCAL 1030</p>	1279
<p>Termination - Petition - Whether events taking place months prior to actual origination and circulation of petition relevant to issue of voluntariness - Employer conduct not tainting petition</p> <p>BELLEVILLE PLAZA; RE CRAIG SCURR; RE SERVICE EMPLOYEES UNION, LOCAL 183; RE GROUP OF EMPLOYEES</p>	1179
<p>Termination - Practice and Procedure - Only one employee need exist to file termination application - Challenge to list untimely - Representation vote directed</p> <p>CITY PLUMBING (KITCHENER) LIMITED; RE RICHARD GRANDY; RE ONTARIO PIPE TRADES COUNCIL OF THE U.A., LOCAL 527</p>	1206
<p>Timeliness - First Contract Arbitration - Interest Arbitration - Reconsideration - Panel refusing to reconsider direction to settle first collective agreement made by original panel - Board failing to comply with time limits in s.40a(4) - Time limits directory only - Employer not appearing nor filing any documents - Board not bound to accept unwritten understanding as basis for contract terms - Agreement between union and related employer used as model for collective agreement</p> <p>NEPEAN ROOF TRUSS LTD.; RE CARPENTERS UNION, LOCAL 1030</p>	1287
<p>Unfair Labour Practice - Colleges Collective Bargaining Act - Intimidation and Coercion - Cancellation of courses taught by full-time faculty in extension program during legal strike not tainted by anti-union motive - Absence of reverse onus in CCBA</p> <p>CAMBRIAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U.</p>	1190

0621-86-R International Union of Operating Engineers, Local 793, Applicant, v. Allan G. Cook Limited, Respondent, v. Group of Employees, Objectors

Membership Evidence - Union organizers discussing circulation of counter-petition with employees during membership drive - Union not required to call evidence of these discussions to prove origination and circulation of counter-petition

BEFORE: *Ken Petryshen*, Vice-Chairman, and Board Members *R. J. Gallivan* and *C. A. Ballentine*.

APPEARANCES: *Bernard Fishbein* and *George Palanuk* for the applicant; *S. C. Bernardo* and *Dave Blenkarn* for the respondent; *David Weller* for the group of employees.

DECISION OF THE BOARD; September 16, 1986

1. This is an application for certification made under the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The Board further finds that this application for certification does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the Act.

4. The applicant proposed a bargaining unit description encompassing all employees of the Respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and those employees engaged as truck drivers and construction labourers in OLRB Board Area #22, excluding the ICI sector, save and except non-working foremen and those above the rank of non-working foreman. The respondent's position regarding the appropriate bargaining unit differed from the bargaining unit description proposed by the applicant in two respects. Counsel for the respondent argued that the Board should exclude from the unit students employed during the school vacation period. In addition, counsel for the respondent argued that the unit should be described in such a way so as to include the classification of site clerk. After considering the submissions of the parties, the Board ruled at the hearing that it would not exclude students employed during the school vacation period and reserved its decision with respect to the site clerk.

5. The Board's practice is to include students in a construction industry bargaining unit. See *Cornwall Gravel Co. Ltd.*, [1967] OLRB Rep. Nov. 797. We were not satisfied that the circumstances in this case would warrant departing from the Board's usual practice. In describing a bargaining unit of the type sought by the applicant in this case, the Board will describe the unit to include all unrepresented trades working on the date of the application. In our view, a person classified as a site clerk is not employed in a construction industry trade. Therefore, the position of site clerk will not be included in the description of the appropriate bargaining unit.

6. Accordingly, having regard to the partial agreement of the parties, the above rulings regarding students and the site clerk and the provisions of section 6(1) of the Act, the Board further finds that all employees of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and

those employees engaged as truck drivers and construction labourers, save and except non-working foremen and those above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. There were fourteen employees in the bargaining unit at the time the application was made. The applicant filed membership evidence on behalf of ten of those employees. The objectors filed with the Board a petition in opposition to the certification of the applicant, bearing the signatures of fifteen employees, eight of whom had earlier signed a membership card in the applicant. The applicant also filed with the Board a counter-petition signed by ten employees, seven of whom had earlier signed the petition after joining the applicant.

8. Counsel for the respondent and the representative of the objecting employees argued at the outset that the Board should entertain the evidence concerning the origination and circulation of both the petition and the counter-petition. After receiving the parties' submissions on this point, the Board ruled that it would begin with an inquiry into the voluntariness of the counter-petition. Once the inquiry into the counter-petition was completed, the Board indicated it would then ask the parties whether they intended to call any further evidence.

9. To date, there have been two days of hearing in this case, July 15th and August 18th, 1986. Unable to complete the inquiry into the counter-petition on July 15th, the case was adjourned and rescheduled for August 18th. By letter dated August 14th, counsel for the respondent advised the Board that he wished to call evidence relating to allegations of impropriety against representatives of the applicant which went to the membership evidence as well as the counter-petition. Over the objection of the applicant and after obtaining the submissions of the parties on this point, the Board ruled that it would entertain the evidence the respondent wished to call and proceeded to do so. At the end of the day on August 18th the hearing was not completed. Up to this point though, the Board had heard all the evidence and entertained the submissions of the parties relating to the counter-petition. The remaining part of this decision is confined to the Board's decision regarding the voluntariness of the counter-petition.

10. Two witnesses testified in support of the counter-petition. George Palanuk, a business representative of the applicant, gave evidence concerning the origination and circulation of the counter-petition. Ken Colclough testified about the origination and preparation of the counter-petition. Betty Burnell, an employee in the bargaining unit, was called by counsel for the respondent in support of the respondent's allegations of impropriety. Thus far, David Weller, the representative of the objecting employees, has not testified in the proceeding but on August 18th he placed before us a number of written statements of employees which he argued were relevant to the counter-petition. These statements contained allegations against the manner in which the union obtained its membership evidence as well as expressions of opposition to the applicant. After reviewing the statements and entertaining submissions of the parties on this point, the Board ruled it could not place any weight on the written statements given their hearsay nature. Having weighed and assessed the evidence relating to the counter-petition, including the credibility of the witnesses, the Board makes the following findings of fact.

11. Palanuk circulated the counter-petition but did not play a role in the union's initial efforts to obtain the membership evidence. Ed Kaplanis and Mike Shane were in charge of the union's organizing drive. As part of their discussions with employees, we are satisfied they advised them that the company or someone else would circulate a petition. As well, Kaplanis and Shane told employees that the union would circulate a counter-petition. When Palanuk circulated the counter-petition, he was aware employees had been advised previously that someone would approach them to sign a counter-petition.

12. Palanuk received a call from the union's Thunder Bay office on or about June 9th or 10th, 1986 and was asked to attempt to obtain support for a counter-petition from the respondent's employees. Palanuk proceeded to Marathon and met with Colclough on June 10th at approximately 8:00 p.m. Colclough gave Palanuk the counter-petition form which Colclough had prepared earlier that day. Late in the afternoon on June 10th, Colclough received a call from the union's Thunder Bay office asking him to prepare the counter-petition. The caller dictated the wording for the counter-petition and asked Colclough to give the document to Palanuk. When Colclough gave the document to Palanuk, it contained the preamble but no signatures. The heading on the counter-petition reads as follows:

COUNTER PETITION

We the undersigned employees of ALLAN G. COOK LIMITED, (The District of Thunder Bay) wish to reaffirm that we wish the INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, to represent us for the purpose of collective bargaining, and we request the "Ontario Labour Relations Board" to disregard any petitions we may of (sic) signed stating other wise.

13. Palanuk had a list of those employees who previously had signed membership cards. He approached employees at their homes and asked them to sign the document in order to support the union's certification endeavour. Palanuk witnessed all of the signatures on the document. The employees who were approached read the document and signed it if they felt so inclined. No one from the management of the respondent was present when employees signed the counter-petition or played any role in the origination and circulation of the document. When discussing the counter-petition with employees, Palanuk did not make any threats or apply any undue influence. The document contains a date and time for each employee's signature. The counter-petition remained in Palanuk's possession at all times until he sent it to the Board.

14. Burnell's evidence confirms the testimony of Palanuk. Palanuk telephoned Burnell and asked if he could come to her home with the counter-petition. Burnell told him that if he brought the counter-petition over, she would sign it. When Palanuk came to her home, Burnell read the counter-petition and signed it. During their conversation, Palanuk made no threats to Burnell.

15. Counsel for the respondent argued that the applicant has not met the onus of proving that the counter-petition was signed voluntarily. In order to satisfy the onus upon it, he submits that the applicant was obliged to call Kaplanis and Shane as witnesses. He suggests that the counter-petition originated in the discussions these organizers had with the employees, and Palanuk, he maintains, was simply performing a mechanical function after the "advance men", Kaplanis and Shane, introduced the idea of the counter-petition. Counsel for the respondent argues that the Board cannot be satisfied that the signatures on the counter-petition were obtained voluntarily without knowing what the organizers said to the employees about the document.

16. The Board has a well established practice of recognizing both petitions and counter-petitions even though both types of documents are not specifically regulated by the Act. Before it places any weight on a petition or a counter-petition, there is an onus on the party attempting to rely on the document to satisfy the Board that it represents a voluntary statement of employee wishes. To satisfy this onus, the Board requires direct evidence with respect to the origination, preparation and circulation of the document. The Board's requirements in this context are elaborated upon in *Taplen Construction Limited*, [1965] OLRB Rep. Nov. 542 at pp.544-45:

... Where objections in writing, signed by employees, are filed with the Board, first-hand evidence is required to be produced at a hearing with respect to the origination and manner in which each of the signatures was obtained. The purpose of such evidence is to ascertain whether

the documentary evidence in question represents a voluntary expression of opinion, free from the influence of management, on the part of those signing the documents. The persons who testify on these matters are *those who have prepared* and circulated the documents in question.

[emphasis added]

The comments of the Board in two other cases are worth noting. In *Formosa Spring Brewery*, [1974] OLRB Rep. Oct. 696, the Board wrote:

The Board has interpreted the words origination, preparation and circulation of the petition to be encompassed by and subsumed in the word "circumstances" in terms of its requirement, for direct evidence of the subsistence of the document *from the point of its inception to the point of its reception by the Board*. This by definition would obviously include first-hand evidence detailing the physical preparation and the actual delivery of the document to the Board...

[emphasis added]

In *Bausch & Lomb Optical Company Limited*, [1969] OLRB Rep. July 478 at 479 the Board wrote:

In the "origination cases" the Board demands some evidence of origination i.e. *the circumstances surrounding the actual preparation of the document*, and failure to adduce evidence in that regard will be fatal to the statement of desire. See *Village Contractors Case*, *supra*, at p. 233.

[emphasis added]

17. These cases make it clear that the Board's focus in a petition or counter-petition inquiry is on the specific documents upon which a party relies. The party who files the particular document must call satisfactory evidence with respect to its origination before the Board will give it any weight. In our view, the applicant has satisfied the onus on it with respect to the origination of the counter-petition.

18. The counter-petition before us was initiated, at the earliest, when Palanuk was contacted by the Thunder Bay office, and asked to circulate a counter-petition. Palanuk proceeded to Marathon and obtained the petition form from Colclough. These are the facts which relate to the origination of the counter-petition. The fact that discussions took place with employees about a counter-petition during the membership drive does not lead us to conclude that the document had its origin in those discussions. During a union's organizing campaign, there are likely to be discussions among employees and others concerning petitions and counter-petitions which may influence the origination of such documents. Evidence relating to such discussions may affect the Board's decision on the voluntariness issue. However, the Board does not require a party relying on a petition or a counter-petition to call evidence of this sort in its efforts to prove the actual origination and circulation of the document. As we see it, there was no obligation on the union to call Kaplanis and Shane as witnesses. We are satisfied that there is no gap in the evidence before us with respect to the origination and circulation of the counter-petition.

19. In assessing the different considerations which come into play in examining the weight to be given to a counter-petition, the following comments in *Frito-Lay Canada Ltd.* [1981] OLRB Rep. May 538 are worth reiterating:

While petitions and revocations have equal status in the sense set out above, the Board recognizes that in assessing the weight to be given to a revocation or "counterpetition" there are different considerations than in the case of a petition opposing the union. In the case of a petition, employee signatories are more likely to be sensitive to the perception of management involvement, or the fear that, a failure to sign may be communicated to their employer and could result

in reprisals. In the case of membership evidence or revocations, however, support will seldom be solicited by individuals who can affect an employee's economic destiny, nor will there usually be any fear that a failure to sign a membership card or revocation will be communicated to the employer and could result in adverse employment consequences. (However, see *Veres Wire* [1976] OLRB Rep. July 337 where the Board rejected certain union membership evidence because of the involvement of a foreman in the union's organizing campaign). Accordingly, the purpose of inquiry into the origination of a revocation statement is to determine whether there is any evidence of threats, intimidation, undue influence, misrepresentation, or other conduct which might impair the ability of an employee to voluntarily express his wishes. The concerns expressed in *Radio Shack* and *Pigott Motors* have no strict application to revocations or union membership evidence.

20. In reviewing the evidence concerning the counter-petition, we are satisfied that there were no threats, intimidation, undue influence, misrepresentation or other conduct which would have impaired the ability of an employee to voluntarily express his or her wishes by signing Palanuk's counter-petition. We are satisfied that the persons who signed the counter-petition knew they were signing a document in support of the applicant union and in opposition to the petition they may have signed previously. Accordingly, we find on the balance of probabilities that the counter-petition represents a voluntary expression of the wishes of those employees who signed it.

21. The matter is referred to the Registrar so that the case can be re-listed for hearing in order to deal with any outstanding issues.

2446-85-R Craig Scurr, Applicant, v. Service Employees Union, Local 183, Respondent, v. **Belleville Plaza**, Intervener, v. Group of Employees, Objectors

Petition - Termination - Whether events taking place months prior to actual origination and circulation of petition relevant to issue of voluntariness - Employer conduct not tainting petition

BEFORE: Ken Petryshen, Vice-Chairman, and Board Members D. A. Patterson and W. H. Wightman.

APPEARANCES: Robert J. Reynolds, Craig Scurr and Doug Jones for the applicant; Gerald Charney, Don Burshaw II, William Love and Cindy Wilkey for the respondent and for the group of employees; Stuart Ducoffe and Martin B. Allan for the intervener.

DECISION OF VICE-CHAIRMAN KEN PETRYSHEN AND BOARD MEMBER W. H. WIGHTMAN; September 30, 1986

1. This is an application made under section 57 of the *Labour Relations Act* for a declaration from the Board terminating the bargaining rights of the respondent trade union. In such cases, the Board is required by section 57(3) of the Act to ascertain "whether not less than forty-five per cent of the employees in the bargaining unit have *voluntarily* signified in writing ... that they no longer wish to be represented by a trade union." (emphasis added).

2. The Board heard evidence from five witnesses. Craig Scurr testified as to the circumstances surrounding the origination, preparation and circulation of the written statement of employee wishes (the petition) filed in support of the application. Doug Jones was called by the applicant and testified in support of the petition. Perry Thorn, Wayne Post and Don Burshaw gave

evidence on behalf of the trade union. Given the small number of employees in the bargaining unit and the number of employees who testified, there was little mystery as to who supported the union and who supported the petition.

3. The application was filed with the Board on December 10, 1985. At the time of the application, the intervener and the respondent were bound by a collective agreement which had a term of operation from December 24, 1984 until December 31, 1985. This collective agreement was executed after a lock-out of approximately six weeks which began February 11, 1985. The collective agreement in force prior to the one referred to above expired on December 24, 1984.

4. Scurr is employed as a janitor and has occupied this position for approximately four and a half years. In the latter part of 1984, Scurr made his first attempt to ascertain the wishes of the employees in the bargaining unit with respect to their desire to have the respondent continue as their bargaining agent. Without obtaining legal advice, he approached all four employees who were in the bargaining unit at the time and asked each one of them to sign a paper which would indicate their desire to decertify the respondent. Since Scurr was able to obtain the support of only one employee, he temporarily abandoned his efforts to decertify the union. The employee who supported Scurr's efforts in late 1984 signed the petition filed in support of this termination application.

5. In late October, 1985, Scurr renewed his efforts to decertify the respondent. The bargaining unit now consisted of five individuals. Scurr first approached two employees informally and ascertained that they would be prepared to support him. Scurr then proceeded to obtain legal advice in November, 1985, and in the early part of December, 1985, received the petition which contained the appropriate preamble from his lawyer along with instructions as to how he should proceed to obtain signatures.

6. All of the signatures on the petition were obtained by Scurr on December 7, 1985. The petition was signed by three employees away from the work location. Scurr testified that no one from management had anything to do with the origination or circulation of the petition. Management personnel were not present when the petition was signed by the employees. Scurr had the petition in his possession at the relevant time and did not show it to anyone other than the two employees who signed it and his lawyer. After obtaining the signatures, Scurr returned the document to his lawyer who forwarded it to the Board along with the application.

7. These facts relating to the origination and circulation of the petition normally would lead us to conclude that the petition reflected the voluntary wishes of the employees who signed it. Counsel for the respondent essentially agreed that based on the facts as related above, it would be difficult to argue that the petition was not voluntary. However, counsel argued that certain events, which for the most part took place prior to the actual origination and circulation of the petition, are relevant to the issue of voluntariness. Counsel maintains, in effect, that these events created an environment within which it would not be possible for employees to express their true wishes. We intend to deal with these events in chronological order.

8. In November, 1984, Gary Stern had a conversation on the employer's premises with Perry Thorn, the union steward. The precise status of Stern is unclear. Stern signs employee cheques, negotiates for the employer and the evidence reveals conversations between Stern and other employees which would indicate that Stern is at least an agent of the respondent. Thorn could not recall the entire conversation with Stern which is not surprising given the lapse of time. Stern began the conversation by saying that whatever he said was off the record and he would deny having said anything. Stern asked Thorn to take a look at what the employees make at Quinte Mall, a non-union enterprise. Stern also advised Thorn that the respondent would like to have him there

for the next ten years and that they have ways of getting rid of people. The discussion ended when Thorn advised Stern that he would talk to the other employees. Thorn discussed the incident with Post and sometime later with union representatives. The union maintained that through this conversation Stern attempted to convince Thorn in a threatening manner that the employees would be better off without a union.

9. The union placed considerable emphasis on events which occurred during the lock-out. The employer locked out the employees but still attempted to have individuals perform the necessary janitorial work. The employer asked a number of the employees to continue working. Scurr continued to work as well as another employee who signed the petition. The employer also hired new employees to work during the course of the lock-out, Doug Jones being one of them. When Scurr worked during the lock-out he was paid an additional fifty cents an hour which was precisely the increase the union was seeking in the first year of the new collective agreement. Scurr was advised by Stern that he would receive the additional fifty cents per hour during the course of Scurr's first day of work after the lock-out commenced. Scurr denied any knowledge of the bargaining positions taken by the parties during the lock-out and he indicated that management advised him to consult with the union about such matters since the employer was not prepared to discuss such matters with him. During the lock-out, the employer made a proposal to the union to the effect that the bargaining unit be changed to exclude those individuals who were working during the lock-out. The union did file a section 89 complaint and alleged that the conduct set out above constituted violations of the Act. This complaint was adjourned *sine die* and never pursued once a collective agreement was agreed to by the parties. Counsel for the union asks us to find that the activities of the employer during the lock-out were designed to remove the union from the scene and were not merely attempts to apply legitimate economic sanctions. He argued that these activities contravened the Act and created the environment within which it would not be possible for the employees to voluntarily express their wishes some eight months later. We note that the evidence relating to the lock-out was accepted over the objections of counsel for both the applicant and the employer.

10. The union also asked us to review carefully the hiring of Doug Jones in September, 1985 which the union alleged contravened section 64 of the Act. Jones was hired to work during the lock-out and left the employ of the intervener when the lock-out ended. Up until September of 1985, the employer had a work force consisting of four individuals with the utilization of some additional help during the summer months. The evidence suggests that the work load had not changed in September nor had customers been complaining. The union maintains that the hiring of Jones occurred only for the purpose of facilitating the termination application and not for legitimate business reasons. Counsel for the union argued that since the hiring of Jones contravenes the Act, we should find the petition was not signed voluntarily.

11. Another matter raised by the union was the fact that Scurr received a one hundred dollar bonus in December, 1985 while the other employees received a smaller bonus. The two individuals supporting the union received a fifty dollar bonus and Doug Jones received a bonus of either twenty or twenty-five dollars.

12. The issue we have to decide is whether the employees who signed the petition did so voluntarily. In assessing whether those matters relied upon by the union impact on the voluntariness of the petition, it is important to recognize that we are dealing with a termination application. As the Board stated in *Ontario Hospital Association (Blue Cross)*, [1980] OLRB Rep. Dec. 1759 at para. 31:

The sole issue before the Board in every case regarding a "petition" is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in

connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which *opposes* the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees' apparent change of hearts. As the Board commented in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462:

In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 (now 57) of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49 (now 57), a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49 (now 57), the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 (now 57) of the Act.

13. The conversation between Stern and Thorn took place a little over a year prior to the circulation of the petition. Thorn testified he only relayed the event to Wayne Post, a union supporter, and the union. There is no evidence before us to suggest that Stern had a similar conversation with any of the other employees in the bargaining unit. Considering the evidence, we are not prepared to infer that Stern had a discussion with Scurr similar to the one Stern had with Thorn. Even if the conversation can be characterized in the manner suggested by the union, we are of the view that little weight can be put on it when assessing the voluntariness of a petition signed in December, 1985.

14. In our view as well, little weight can be placed on the events surrounding the lock-out. In refusing to entertain evidence relating to the environment created by a labour dispute, the Board in *Ottawa Journal*, [1978] OLRB Rep. March 291, had this to say:

Counsel for the respondent asks the Board to draw the inference that because of the climate generated by the protracted labour dispute the statement in support of the termination application is not a voluntary one. In so doing the respondent is asking the Board to draw the inference that free expression has been thwarted because of circumstances *not directly related to the origination, preparation and circulation of the statement*. Even if the Board assumes that the respondent can establish the material facts upon which it intends to rely - and indeed a number of these facts are a matter of record having been set out in the Board's decisions dealing with the section 79 (now 89) complaints brought by the parties - the Board would not be prepared to draw the inference which the respondent suggests.

[emphasis added]

In a similar context, the Board in *Ontario Hospital Association (Blue Cross)*, *supra*, noted that "if the employers actions overstep the bounds of lawful conduct, or are considered to be something other than they appear, the trade union has its remedies."

15. The petition before us was circulated approximately eight months after the lock-out ended. The Board finds there is nothing in the evidence which suggests that the actions of the employer had as their objective the origination of a termination application, or prevented employees from making up their own minds on union representation. If anything, a close examination of the choice made by employees during the lock-out, is some evidence which suggests the petition

which they eventually signed is a voluntary expression of their wishes. The employees who signed the petition are individuals who elected to work during the lock-out and two of them had previously revealed a desire to terminate the union's bargaining rights. The decision to work by these three employees was made prior to any knowledge of the matters of which the union complains.

16. The union's position with respect to the hiring of Jones appears to us to be irrelevant to the question of whether employees signed the petition voluntarily. Even if we were to assume that Jones was hired by the employer in order to pave the way for this termination application, this fact in and of itself would not lead one to conclude the petition was tainted. The more natural inference to draw, if the union is right, is that when Jones signed the petition he did so because he desired to terminate the union's bargaining rights and for no other reason.

17. In support of his argument that the hiring of Jones contravened the Act which in turn affected the voluntariness of the petition, counsel for the union referred us to *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577. An examination of this decision indicates that the focus of the Board was not on the issue of voluntariness. In *April Waterproofing Limited*, the Board had before it a "displacement" certification application where the support for the raiding union came from some employees who were hired contrary to the terms of the incumbent union's collective agreement. The Board found that the hiring of these employees was improper and decided that since they were not lawfully in the bargaining unit, they should not be treated as employees in the unit for the purpose of section 7(1) of the Act.

18. We have no difficulty in accepting the principle enunciated in *April Waterproofing Limited* or the rationale in *Custom Aggregates*, [1978] OLRB Rep. March 215 wherein the Board directed a new vote after finding the employer had "padded the list of eligible voters" with a view to influencing the representation vote. Employer conduct in hiring certain individuals, if found to be contrary to the *Labour Relations Act*, may affect the Board's determination of the bargaining unit composition and of the voting constituency. But an alleged illegal hiring standing by itself is not relevant to the question of whether employees signed the petition voluntarily. We note that after reviewing the list of employees filed with the Board by the employer, the union did not challenge the name of Jones on the list.

19. Counsel for the union did not place much emphasis in argument on the bonus paid to Scurr. It is unclear from the evidence when Scurr was paid the hundred dollar bonus. The payment was probably made subsequent to the signing of the petition since it was a Christmas bonus. The evidence does not reveal with any certainty whether any of the other employees were aware of the amount of the bonus paid to Scurr. Post, for instance, testified he knew Thorn received a fifty dollar bonus but not what other employees received. The Board, therefore, finds that the payment of a larger bonus to Scurr in December, 1985 is of no assistance to the union in this case.

20. Having regard to the evidence before it and the reasons set out above, the Board is satisfied that the petition submitted in support of this application is a voluntary expression of the true wishes of those who signed it. The Board is further satisfied that not less than forty-five per cent of the employees of Belleville Plaza in the bargaining unit at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of January 23, 1986, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 57(3) of the Act.

21. Accordingly, the Board directs that a representation vote be taken. Those eligible to vote are all employees at the Belleville Plaza, Dundas Street East, Belleville, Ontario, save and

except supervisors, foremen, persons above the rank of supervisor or foreman, and students employed during the school vacation period, on the date hereof, who do not voluntarily terminate their employment and who are not discharged for cause between the date hereof and the date the vote is taken.

22. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Belleville Plaza.

23. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER D. A. PATTERSON;

1. I dissent from the decision of the majority. On the basis of all of the evidence, I would have concluded that the petition cannot be accepted as a voluntary expression of employee wishes.

2. The majority appears to accept the petition on the basis that there was no evidence of employer involvement in it. I must concede that there was no evidence of direct or indirect employer involvement in the petition itself. However, a petition can be tainted otherwise than by employer involvement in its origination or circulation.

3. In my opinion, in assessing the voluntariness of a petition, whether in certification or termination proceedings, the Board must not examine the origination and circulation of the petition in isolation. The Board must look at the environment in which the petition was created. The evidence clearly indicates that the petition in this case was a result of the environment deliberately created by the employer.

4. It is the employer, not the employees' bargaining agent which establishes that relationship and atmosphere by its actions towards its employees and the bargaining agent. It is also reasonable to assume that generally employees would wish to be seen as being supportive of their employer rather than against the employer. As the Board has said in *Radio Shack and the United Steelworkers of America*, [1978] OLRB Rep. Nov. 1043 at paragraph 24 where the Board referred to the *Pigott Motors*, case 1963 CLLC 16,264:

In view of the responsive nature of his relationship with his employer and his natural desire to want to appear to identify himself with the interests and wishes of his employer, *an employee is obviously peculiarly vulnerable to influences, obvious or devious* which may operate or impair or destroy the free exercise of his rights under the Act.

[emphasis added]

The union does not enjoy any control over employees. It can only respond to the atmosphere created by the employer through the collective bargaining process. Therefore, it is clear that compared to the union, the employer is in an immensely powerful and influential position over the employees. The aforementioned cite from *Pigott Motors* establishes the Board's approach to petitions on applications for certification. I contend that the same principle must be applied similarly in applications for decertification. The Board must consider more than just the petition and how it was arrived at. To consider less than the overall picture, the Board would be remiss in addressing the seriousness a petition suggests in either certifications or decertifications.

5. I note the following conduct of the employer which created an atmosphere which prevented any free expression by employees, and in my view paved the way for the petition.

(a) The employer locked out its employees and granted wage increases to

replacement workers who crossed the picket line. After the lock-out was initiated by the employer, it chose to hire replacement workers and solicit employees to come back to work. The applicant testified Mr. Stern, for the employer, offered him fifty cents an hour increase if he crossed the picket line.

- (b) Paid the applicant employee a wage rate which was exactly what the union had demanded and was refused. The applicant as a member of the bargaining unit must have been aware of the last offer from the employer. The majority of four janitors voted against the employer's final offer. The applicant must also have been aware of the union's final demand proposal. The employer paid the applicant exactly what the union had demanded and what the employer had denied and refused the union. In retrospect the employer's bargaining posture was more than just a tough bargaining position. Up until the union filed section 89 charges against the employer, the evidence brought out by Mr. Burshaw II, President of Local 183, was that the employer's bargaining position was not designed for a settlement. The employer was offering a lower than demanded wage increase, a carve out of the applicant and another employee, a voluntary membership clause. The section 89 charges were withdrawn by the union because the new offer from the employer was subject to the charges being dropped.
- (c) Mr. Stern, an agent of the employer, met an employee at the work place, and told him that "we'd like to see you around here for the next ten years but we've found ways to get rid of people." Thorn testified that he understood Stern to be asking him to get rid of the union. Mr. Stern also met Mr. William Max Post in his office at Crawford Metals and the Board heard evidence Mr. Stern also had a conversation with the applicant. Post, Thorn and Scurr all recognized Mr. Stern as Mr. Marty Allen's superior even though he works for Crawford Metals in Belleville. Mr. Post testified he saw Mr. Stern at the bargaining table for Belleville Plaza. Mr. Stern's comments to Mr. Thorn are the most disturbing. He made the comparison for Mr. Thorn between Crawford Metals and the Quinte Mall to the Belleville Plaza. Stern pointed out neither were unionized and they were all working and making good money.
- (d) The employer hired a well-known union opponent to ensure that the petition would have the necessary support. The applicant testified Mr. Jones would make the majority on another petition to decertify the union. Mr. Thorn testified he did not know why Jones had been hired, their work had remained the same as always. Thorn testified when summer students had been hired they did odd jobs and general maintenance work. Thorn was adamant that Jones' employment did not lessen the work load of the four janitors and their work load had not increased. Mr. Jones testified that his feelings about the union were well known. The employer had used Jones as a replacement worker during the lock-out. Jones was re-hired just prior to the open period and expiry date of the collective agreement.
- (e) The applicant employee received a \$100.00 Christmas bonus which was

more than that received by any other employee and could not be explained in any rational way.

Bonus	Seniority	Christmas
Craig Scurr	4.5 years	\$100.00
Perry Thorn	4.0 years	\$ 50.00
William Max Post	3.0 years	\$ 50.00
Douglas Jones	.25 years	\$ 25.00

The Board heard no evidence from Mr. Marty Allen why the applicant received more Christmas bonus than any other employee. It is apparent that the employer chose to reward Scurr more than any other employee. Scurr also testified he used the money to pay his lawyer for representing him during the application for termination.

6. The Board has in numerous cases recognized that due to the nature of an employee's relationship with the employer, the employee is peculiarly vulnerable to influences, obvious and devious, which may operate to impair or destroy the exercise of free wishes. (See for example *Radio Shack*, [1978] OLRB Rep. Nov. 1043). At page 1049 the Board said:

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that *it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it.*

[emphasis added]

7. In a number of certification cases the Board has held petitions to be tainted indirectly because of employer conduct. (See, *K-Mart Canada Limited*, [1981] OLRB Rep. Jan. 60; *Washington Mills Limited*, [1982] OLRB Rep. May 783; *Vogue Brassiere Incorporated*, [1983] OLRB Rep. Oct. 1737).

8. While these cases dealt with petitions submitted in opposition to certification applications, the issue in termination applications is the same, namely, is the petition voluntary.

9. The Board in *Irwin Toy Limited*, [1983] OLRB Rep. July 1064 refused to give effect to a termination application on the ground that the employer through its conduct had deliberately created conditions for termination of the union's bargaining rights. The same reasoning should apply in this case and a finding should be made that the petition was not voluntary.

10. I would have dismissed the application.

2467-84-M; 2468-84-M; 2791-84-M Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Applicant, v. Brant County Board of Education, Respondent

Construction Industry Grievance - Employer - Respondent hiring person to oversee masonry restoration - Applicant arguing *res judicata* on issue of whether respondent an “employer” in the construction industry based on previous case - Distinction between “owner” or “purchaser” and “employer” in construction industry discussed

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. F. Kennedy and M. Eayrs.

APPEARANCES: B. Fishbein and T. Oldham for the applicant; Janice Baker and Joe Saldarelli for the respondent.

DECISION OF THE BOARD; September 23, 1986

1. These three cases are referrals of grievances for arbitration pursuant to section 124 of the Act. They involve three different projects. However, all three allege a violation of the subcontracting clause in the provincial collective agreement between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Craftsmen and The Masonry Industry Employers Council of Ontario which is binding upon the respondent.

2. The present cases are similar to a previous case between the same applicant and the same respondent. (See *The Brant County Board of Education* [1984] OLRB Rep. Oct. 1349). Like the previous case, in the present case there is no issue that the collective agreement referred to above is binding on both parties and that the contracts were let to various non-union employers. Indeed, as a consequence of this the applicant argued that the present case was *res judicata* (an unusual plea for an applicant).

3. In its previous decision, the Board, on the basis of certain agreed facts, specifically rejected the argument that the respondent was not an employer in the construction industry and in effect found that the respondent was *still* an employer in the construction industry since it had been so recently certified by the trade union in the construction industry. Consequently, the Board found that the subcontracts to non-union employers were violations of the “subcontracting clause” in the provincial collective agreement for bricklayers.

4. We are not prepared to find that the present case is *res judicata* as a result of the previous decision of the Board. The previous decision rested upon certain agreed facts which are not agreed to in the present case but more specifically the scope of the Board’s decision leaves open the possible finding, in a future case that, the respondent might not be an employer in the construction industry at a future date. As the Board reasoned in its earlier decision:

12. However, having once been recognized as an employer operating a business in the construction industry, does the respondent forever maintain that characterization? It certainly does not do so automatically. Depending on the nature of projects undertaken and one’s involvement in those projects, an entity can change from being the operator of a business in the construction industry and thus an “employer”, to be simply being an “owner” of property who purchase construction or masonry services. But on the basis of the evidence before this Board, we are bound to conclude that when engaged on the project in question the respondent must still be considered to be operating a business in the construction industry and thus, an employer bound by the provincial agreement. The facts put before this Board established that the respondent was certi-

fied in the summer of 1983 as an employer who was bound by the Provincial Agreement between the applicant and the Masonry Industry Employers' Council of Ontario. Thus, it was recognized that as of that time, the respondent was operating a business in the construction industry. A short time later, the respondent let out a contract for the work that is now in question was to have masonry work performed on a building owned by the respondent. It is clear that this work falls within the scope of the provincial agreement and is construction or masonry work. Thus, the respondent must be viewed as continuing to be engaged in the operation of the construction business by its contracting for the performance of masonry work. While the onus is upon the union, the weight of this evidence combines to persuade the Board, on the balance, that the respondent continues to be operating a business in the construction industry and was engaged in a project regarding work covered by the provincial agreement.

13. This evidentiary conclusion is to be distinguished from the situation where evidence can establish that an entity has changed its status from being an employer because it is operating a business in the construction industry to becoming simply an owner of property who is purchasing construction skills or services. That was the situation in the *Kapuskasing 2* case where the Board of Education was found to have become an "owner" rather than an "employer" within the meaning of the collective agreement. This distinction could be established, *inter alia*, by evidence regarding the nature of work being done, the respondent's degree of control over the project, the work, the materials and the manpower as well as its participation, if any, in the project in question. However, on the basis of the facts before this Board, we find it reasonable to conclude that the respondent was acting as an "employer" in that it was operating a business in the construction industry at all material times.

Thus, the Board left open the question, as to whether, in future circumstances, the present respondent might not be an employer in the construction industry. On the facts of the present case the respondent now seeks to show that it is no longer in the construction industry.

5. The problem raised in the present case is considerably more difficult than the problem in a certification case where the application for certification is brought pursuant to the construction industry provisions of the *Labour Relations Act*. In such certification cases, the employer has employees performing work that is normally work considered in the construction industry and, therefore, a conclusion that the person is operating a business in the construction industry flows from the finding that the person actually has employees in the construction industry. Consequently, the focus of many of the certification cases is whether having employees engaged in construction constitutes the operation of a business in the construction industry. The present case raises the problem that the employer does not have employees, but if it is operating a business in the construction industry, the respondent is caught by the subcontracting clause in the collective agreement between the employer and the trade union.

6. The very origin of the subcontracting clause is to prevent an employer bound by a collective agreement from avoiding that collective agreement by contracting out the work rather than performing the work with its own employees. Such clauses have been regarded by this Board (see, *The Metropolitan Toronto Apartment Builders Association* [1978] OLRB Rep. Nov. 1022) as valid "union security" provisions in that they attempt to protect a legitimate concern of the trade union, i.e. rendering bargaining rights meaningless by subcontracting. The impact of the clause then is to say to the employer "you don't have any employees in the construction industry but you ought to have our members working on the job and therefore you have violated our collective agreement." Almost by definition then, it will be seen that in subcontracting cases, such as the present, there is no employment relationship to place the respondent in the construction industry.

7. From the employer's point of view, the result would seem to be that once having engaged in the construction industry and having been certified by a trade union such as the applicant trade union, the employer is bound by the subcontracting clause, particularly in relation to the industrial, commercial and institutional sector of the construction industry until such time as a suc-

cessful termination application is brought by employees. Further, the subcontracting clause will be in effect so that even though the employer may wish to contract out the work the scope of contractual arrangements that can be made is limited to those contractual relations which comply with the subcontracting clause in the collective agreement. In the previous decision by this Board, the comment was made that the employer was bound by the subcontracting clause only where the employer was an employer operating a business in the construction industry and thus bound by operation of the *Labour Relations Act* to the provincial agreement between the trade union and the relevant employer bargaining agency. The question which arises in the present case thus becomes; can an employer, bound by a provincial agreement, *purchase* construction outside the scope of the subcontracting clause, that is, can the employer act as a *purchaser only* and not as a person operating a business in the construction industry?

8. We are of the view that this may be possible, but there are no clear cut simple criteria, which exists to delineate when a person is simply purchasing construction and not operating a business in the construction industry.

9. In paragraph 13 of its previous decision, the Board suggested some directions which might be explored in order to develop a distinction between "owner" or "purchaser" and employer. In the present case there is an example of one such criteria which might be a valuable method for determining whether or not a purchaser, when purchasing construction, is or is not engaged in a business in the construction industry. We would suggest that the amount of control exercised by the purchaser can frequently be used to determine whether or not that purchaser is operating a business within the construction industry and, thus, bound by a subcontracting clause. On the one hand, there are situations where a purchaser of a certain construction has the undertaking designed and drawn by a third party, for instance, an architect or engineer, and the purchaser then puts the matter up for public tender and has the third party architect or engineer supervise and control the construction. The purchaser may take the position that as a purchaser there is no control by the purchaser over the construction job site. That is, the totality of the construction is totally in the hands of other entities and the purchaser is no more in the construction industry than, for instance, the purchaser of an automobile is engaged in the automobile manufacturing industry.

10. However, few purchasers of construction are prepared to be that totally isolated from the construction work that they are purchasing. Thus, on the other hand, if the purchaser wants to retain control of the job site or to retain control over the quality of the construction work performed, then that purchaser is a very real entity on the job site and can be said to be engaging in a business in the construction industry by virtue of exercising that control.

11. For example, many of the larger and frequent purchasers of construction have their own staff who are assigned tasks on the construction work site. Some tasks relate to the quality of the work, the cost of the work or in some cases the labour relations on the total job site. It is impossible to say that such a purchaser of construction with a presence on the job site (indeed frequently exercising indirect but very real control over the job site) is not engaging in the construction business notwithstanding the fact that that may not be the primary business of the purchaser.

12. The facts in the present grievances are themselves a very interesting example of this kind of control over the job site. The major grievance we are concerned with involves certain brick work in relation to a historic building and the respondent Board of Education hired a person on its staff with a background in masonry restoration. And indeed, in reviewing the bidders on the job, the evidence is that Mr. Saldarelli, specifically rejected certain bids as potentially doing very real damage to this historic site because of the contractor's lack of competence. At that point, the respondent cannot be said to be simply a purchaser of construction. The respondent is making a busi-

ness decision about the contractor that will do the work which is essentially a business decision frequently made by contractors and is thus engaging in a business in the construction industry. In all three of the grievances before us, the role played by the respondent Board of Education was such that they exercised enough control to be engaged in the construction that was the subject of these grievances.

13. In conclusion therefore the three grievances are allowed. The applicant is entitled to compensation for breach of the subcontracting clause by the respondent. The matter is referred back to the parties to agree on the issue of compensation. In the event that they are unable to reach such agreement, we remain seized of that issue.

3148-84-U; 3346-84-U Ontario Public Service Employees Union, Complainant, v. Cambrian College of Applied Arts and Technology, Respondent

Colleges Collective Bargaining Act - Intimidation and Coercion - Unfair Labour Practice - Cancellation of courses taught by full-time faculty in extension program during legal strike not tainted by anti-union motive - Absence of reverse onus in CCBA

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *F. W. Murray* and *M. A. Ross*.

APPEARANCES: *Ian Roland* and *Francois Legault* for the complainant; *D. K. Gray*, *G. Crombie*, *F. Howe* and *R. C. Hurley* for the respondent.

DECISION OF THE BOARD; September 25, 1986

1. On agreement of the parties, the above complaints were consolidated. The complaints allege violation of sections 65 and 75 of the *College's Collective Bargaining Act* (CCBA) in the cancellation by the respondent of courses taught by full-time teachers in the extension program in the Fall 1984 semester (Board File No. 3148-84-U) and in the cancellation of two courses scheduled in the Winter 1985 semester in the extension program to be taught by *L. C. Hopkins*, a full-time teacher (Board File No. 3346-84-U). The complaints assert that the former cancellations occurred because of a legal strike by full-time teachers commencing October 17, 1984 and the latter cancellations because of criticism by *Hopkins* of the selection of a labour representative on the respondent's Board of Governors and *Hopkins'* participation in the earlier strike.

2. Board File No. 3148-84-U initially was brought on behalf of seventeen grievors. Five individuals (*A. Brutto*, *J. Spencer*, *J. Hood*, *P. Kallio* and *K. Burns*) requested, in writing, that their names be deleted from the complaint. Accordingly, the matter preceded with respect to the remaining twelve grievors.

3. The Board heard testimony from thirteen witnesses and a number of exhibits were filed. The Board has assessed the credibility of the witnesses according to the usual criteria, namely, the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections, their demeanor while testifying, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered. For the most part, the Board regards the differences in testimony as relatively minor and to be

expected given the passage of time. The Board has some specific comments regarding credibility, *infra*, as appropriate. Having weighed and assessed the evidence, including the credibility of the witnesses, the Board makes the following findings of fact.

4. On October 17, 1984, the Ontario Public Service Employees Union (OPSEU) representing full-time teachers at community colleges throughout Ontario commenced a legal strike. It was not disputed that the *College's Collective Bargaining Act* mandates province-wide bargaining between the Council of Regents on behalf of the twenty-two Colleges of Applied Arts and Technology and an employee organization, in this case, OPSEU. There was no dispute, as well, that the CCBA, by virtue of section 59(2), deems all employees in the bargaining unit concerned to be taking part in the strike where the employee organization gives notice of a lawful strike and payment of salary or benefits to those employees during such period is prohibited.

5. The respondent, Cambrian College, offers a "regular" program to full-time or "day" students and an "extension" program in the evening at various locations. The extension program consists of "credit" courses (courses which are accepted toward a degree, diploma or certificate) and general interest or non-credit courses on a wide range of subjects. Persons enrolling in the extension courses include those from the community and day students. In particular, day students may register in credit courses in the extension program for several reasons, including, "make ups" for failed courses and because of time tabling conflicts in the regular program. The extension program is staffed by full-time teachers at the College and part-time instructors. Generally, the full-time teachers offer instruction in credit courses in the extension program rather than the general interest courses. In the Fall 1984 semester, of the approximately four hundred extension offerings, about forty-five were credit courses taught by full-time faculty.

6. Many full-time faculty regularly teach one or more courses in the extension program, in one or more of the Winter, Summer and Fall semesters. Such courses are separate from the "regular" workload of full-time teachers. These positions fall outside the work covered by the collective agreement. The extension program administration contracts individually with the instructors, including full-time faculty, to teach these courses. Occasionally, a full-time teacher will offer a credit course through the extension program "on-load", that is, as part of his or her "normal" workload as a full-time teacher at the College. Instructors are hired for the extension program by the administrative staff responsible for the program in consultation with the various department heads and division directors. Individual full-time teachers may express interest to their department chairpersons in teaching particular courses in specific semesters and/or the department heads may approach individual faculty members before making recommendations regarding the staffing of the extension courses.

7. With the onset of the strike, the full-time faculty ceased to teach both their regular courses and those in the extension program. Students in the extension program were informed through press releases and in-class announcements just prior to the strike that most extension courses would continue. Those courses taught by full-time faculty, however, were temporarily suspended and those students individually notified of this. That is, those students remained registered but were told that, if the strike was lengthy, they would be notified about applying for a refund of fees.

8. It is appropriate to indicate the roles and identities of several of the administrative staff relevant to these complaints: G. Crombie, College President; T. Blundell, the Dean of College Programs; D. Lake, Director of the Science and Technology Division, previous Department Chairperson and also responsible for the Labour Studies Program; P. Taylor, Chairperson of the

Department of Chemistry, Metallurgy and Physics; P. Derks (formerly Neuper), Director of Community Programs; S. Del Missier, Community Programs Manager.

9. Not surprisingly, the strike occasioned considerable uncertainty with respect to all courses scheduled in the Fall semester in the day school and those courses which were temporarily suspended in the extension program. The administration established an evaluation committee which met frequently throughout the strike to assess matters. An effort was made by the College administration to establish a communication link with the union during the strike to deal with a variety of concerns but this was apparently rebuffed. The extension courses which were not taught by full-time faculty were monitored throughout the strike by the administrative staff with respect to attendance, incidents and complaints. Crombie informed those attending an administrative meeting held at the strike's commencement of the College's initial responses and that the situation would be reviewed in approximately two weeks, namely, at the end of October, should the strike continue.

10. On October 31, 1984, Crombie and Derks met to discuss the impact of the strike on the extension program. It was decided to seek replacements for the full-time teachers whose extension courses thus far had been suspended. Del Missier was directed to prepare a listing of those courses taught by full-time faculty. She did so, categorizing those courses as "easily" replaced, "difficult" to replace or "virtually impossible" to replace and indicating recommended replacements where possible. As Derks was away, Del Missier met directly with Crombie on November 2 (Friday) to review her listings. She was instructed by Crombie to commence immediately replacing instructors wherever possible in consultation with appropriate divisional directors.

11. Del Missier began that process on the Friday, following the meeting with Crombie, and continued to contact possible replacements on the weekend (November 3 and 4) and early the following week. By Monday, November 5, several replacements had given commitments to teach the remainder of the courses in question, including D. Boyer, J. St. Pierre, P. Montgomery and G. Cooper, to give some examples. Del Missier indicated some replacements were informed that they could have a week to prepare, if necessary. In fact, several replacements actually commenced teaching or meeting classes in the week of November 5. As soon as replacements were confirmed, the Registrar's office contacted students by telephone to indicate when the classes would recommence. In perhaps two instances, the schedule of the replacement necessitated a change in the original night allocated for that class. Students were canvassed as to the acceptability of an alternative night and, where that was acceptable, the new slot was confirmed. Students who could not meet that time were given refunds.

12. Crombie and Derks, in mid-week, reviewed the lists of suspended courses in the context of the numbers of replacements who had been located. On Wednesday afternoon, November 7, Crombie indicated that those courses for which replacements had not been found were to be cancelled. That was communicated late Wednesday or early Thursday to Del Missier who started contacting the relevant full-time faculty later on Thursday. The Board accepts Del Missier's characterization of those telephone calls as an unpleasant duty. The calls were generally quite brief; Del Missier indicated that the classes had been cancelled or would be completed by a replacement. The process of notifying the full-time faculty took several days given some were not reached at the initial attempt. A few faculty were notified by department chairpersons. Students in those classes to be cancelled were telephoned by the Registrar's office commencing late Wednesday or early Thursday; students were told of the cancellation and that a full refund would be forthcoming.

13. The Board does not regard it as necessary to comment on all of the telephone conversations between Del Missier and the various full-time faculty about which the Board heard evidence.

The Board does note that P. Brousseau called Del Missier on Thursday morning, November 8, to inquire about her course in the extension program. Brousseau is a personal friend of Del Missier. The Board accepts Del Missier's account that she hesitated to tell Brousseau outright that morning that a replacement had been found to complete Brousseau's course until Del Missier had double-checked that the decision had not been rescinded. The Board also concludes that Del Missier was likely somewhat evasive in that first conversation given the personal relationship between the two. Once Del Missier confirmed with Derks that the courses were cancelled and the replacements would continue where replacements had been found, she called Brousseau back and relayed that information. Another full-time instructor, H. Wicke, informed Del Missier when she called that the bulk of his course, which had a practicum and in-class components, had been completed. Del Missier replied that she would pass on his concern; she did so and relayed the response that the decision to cancel would not be rescinded. Finally, another faculty member, J. Wardle, was initially notified by Del Missier that both his courses in the extension program were cancelled. However, one of those courses was part of his normal teaching load at the College. Del Missier checked with Derks and the "on-load" course was continued.

14. The process of seeking replacements and cancelling extension courses for which no suitable replacements could be found took place against the backdrop of continued negotiations between the Council of Regents and the union during the strike. As noted earlier, an evaluation committee met regularly to assess the impact of the strike. Reports were continuously forwarded by the College administration to the Minister regarding the effect of a strike of varying duration on the prospect of completing the semester and the educational program of the students. A report forwarded on Wednesday morning, November 7, advised the Minister that, in the view of the College administration, the strike could continue to January 1985 without jeopardizing the students' academic program. On Wednesday and Thursday, however, there were rumours that legislation would be introduced ending the strike and ordering the teachers back to work. On Thursday afternoon, the Minister announced that legislation would be introduced later that day; the Bill received first reading at 4:00 p.m. but it was less certain when the Bill would be passed into law. The College put out a public service announcement on Friday, November 9 that, if the legislation was passed that day, regular classes would resume on the following Monday, namely, November 12. According to Hansard, the legislation was given third reading at 4:50 p.m. and Royal Assent immediately thereafter.

15. In preparation for the day students' return, D. Lake and F. Wilson, both divisional directors, met on the weekend of November 10 and 11 to revise the timetabling in order to implement a decision to extend the Fall 1984 term to compensate for the time lost due to the strike. Earlier versions of revised timetables to reflect time lost to the strike had been submitted to President Crombie throughout the work stoppage. Day students were informed that the Fall 1984 semester would continue into January 1985, with classes themselves scheduled until January 23, 1985. The Fall semester for the extension program was formally extended as well and a few of the courses taught by the replacement teachers continued into early January. The Winter 1985 semester for the extension program commenced in early February, following the start of the (delayed) Winter day semester by the usual period.

16. The Board considers it expeditious to next outline its factual findings touching on the teaching of Hopkins in the extension program. First, though, it is necessary to briefly sketch the policy regarding enrolment in extension courses. Generally, courses required paid registrations of at least ten students or were cancelled. This policy was not formal but reflected a long-standing practice. There were several exceptions to the policy. For example, general interest courses could run with fewer than ten students as these were operated on a cost-recovery basis. Some courses were offered by the College on a "contract" basis wherein costs were billed to an employer, for

example, pursuant to an agreement. For credit courses, funding was linked to enrolments and the minimum of ten students approximated a break-even point. In some circumstances, credit courses were offered despite an enrolment of less than ten. For example, exceptions to the "ten students" policy were permitted where the course was offered in one of the smaller communities served by the College, where the course was the last requirement in a certificate or diploma program or where the course was offered for the first time in order to get the course "off the ground", so to speak. In the Board's view, while the enforcement of the policy may have been somewhat less rigorous prior to Derks becoming Director of Community Programs, during her tenure in that position the policy was more consistently followed.

17. Hopkins had taught physics and/or chemistry in the extension program on a fairly regular basis. In the Fall 1984 semester, Hopkins was scheduled to teach one course, Chemistry I. Chemistry I initially was to commence on September 19. On September 13 or 14, Del Missier informed Hopkins that a minimum of ten registered students was needed or the course would be cancelled; at that point, six students were enrolled. Hopkins indicated he would endeavor to obtain further registrants. Del Missier agreed to cancel the first class and, thus, delay the course for one week to see if further enrolments materialized. Del Missier spoke with Hopkins on September 27 at which point eight students were formally registered. The Board heard detailed accounts of the number of students enrolled, of one student who withdrew and was to re-register, of one student who was to transfer from another course and of two students whose registration cheques Hopkins was holding during the period when it was unclear if the course would be offered. The Board finds that Del Missier's account of the telephone conversation with Hopkins is far more credible and consistent with a reasonable interpretation of the evidence, including the documents filed. That is, the Board finds that Hopkins assured Del Missier that the minimum of ten students would be reached by the new start date for the course. On this assurance, Del Missier permitted the course to run. In the Board's view, Del Missier was a highly credible and candid witness. The Board notes that Del Missier's account is partially corroborated by Lake, a friend of Hopkins, who testified that his impression from his conversations with Hopkins was that Hopkins indicated there would be ten registrants.

18. Given Hopkins' assurances regarding enrolment, Del Missier did not follow up the matter with the Registrar. Once the strike commenced, however, a review of all extension courses revealed that Chemistry I only had eight registrants. Derks obtained verbal authorization from T. Blundell, Dean of College Programs (the extension division) to cancel the course. Formal notice of this was given to the Registrar at 8:15 a.m. on November 5, 1984. In view of the ongoing strike, Hopkins was not notified immediately of the cancellation.

19. In December 1984, Derks and Del Missier met with Lake to determine the instructors for the Winter 1985 semester. Lake recommended Hopkins for at least one course. Derks and Del Missier did not agree. Both considered Hopkins to have been "unprofessional and untruthful in the manner in which his course had started and continued" in the Fall semester. Further, both felt Hopkins, in the past, had been rude and aggressive to support staff. Two or three specific incidents over the years which had come to their attention were raised. As a result of the discussion, it was understood that, if Hopkins was to teach in the Winter 1985 semester, Blundell's authorization would be required as Derks would not otherwise approve the recommendation.

20. In January 1985, Del Missier learned that Hopkins was scheduled to teach Physics I and share Chemistry I with another faculty member. Derks contacted Blundell who indicated he had not authorized the appointments. Crombie was apprised of the situation and decided that Hopkins was not to teach in the Winter 1985 semester. Hopkins was informed of the decision by Lake who indicated that he (Lake) did not know the reasons but that Hopkins should contact Crombie

directly for the explanation. Hopkins at no time contacted Crombie to learn the reasons involved. At the time both courses were cancelled, approximately February 1, 1985, the enrolment in Chemistry I and Physics I was two and five respectively.

21. During January, as well, the Council of Regents was seeking a replacement for the labour representative on the College's Board of Governors. The local labour council recommended three persons, apparently after some internal dispute as to the selection. The Council of Regents did not accept the labour council's choices but appointed Ron MacDonald, President of Local 6500 of the U.S.W.A. The controversy was reported in the press. In the labour council's in-house publication, Hopkins was quoted as describing the labour council as being used in a tokenistic way and suggesting "disengagement" of the labour council from the College.

22. In August 1985, Lake met with Crombie and Derks to discuss the possibility of Hopkins' teaching in the Fall 1985 semester. It was agreed that Hopkins could teach and a memo was addressed to Hopkins from Derks politely referring to the Fall 1984 course enrolment and Hopkins' relationship with support staff. The course assigned, again Chemistry I, was eventually cancelled because of insufficient enrolment.

23. The Board next sets out the thorough and able submissions of counsel in a highly abbreviated form.

24. Counsel for the complainant acknowledged the absence of a "reverse onus" clause in the CCBA comparable to section 89(5) of the *Labour Relations Act* and referred to two cases of the Board predating section 89(5) as establishing the standard for evaluating the evidence: *National Automatic Vending Co. Ltd.*, 63 CLLC 16, 278; *Delhi Metal Products Limited*, [1974] OLRB Rep. July 450. Counsel reviewed the evidence of Crombie, Derks and Del Missier regarding the reasons for the cancellations in the Fall 1984 semester and submitted those reasons were inconsistent and not plausible. Counsel argued the full-time faculty could have resumed their courses given the extended semester, even where replacements had been hired and commenced teaching and, certainly, rather than cancelling those courses for which replacements could not be found. It was asserted the circumstantial evidence pointed to a decision by Crombie to replace or cancel those courses to demonstrate that the faculty could not strike with impunity. With respect to Hopkins, counsel argued that Hopkins had not intended to be misleading as to the enrolment in the Fall 1984 course and that the ostensible reason for cancellation, namely, low enrolment, was a subterfuge. Further, the reasons given for the cancellation of the Winter 1985 courses were not credible but, it was asserted, the real reason reflected Hopkins' involvement with the labour council recommendation for the Board of Governor's appointment and his union activity.

25. Counsel for the respondent agreed that there was no reverse onus under the CCBA and distinguished those cases cited by the complainants. Counsel reviewed the evidence and submitted that the College had responded to the impact of the strike on its operations in a *bona fide* matter without anti-union motive, referring to the reasoning in: *Webster & Horsfall (Canada) Ltd.*, [1969] OLRB Rep. Sept. 780; *Mini-Skool Ltd.*, [1983] OLRB Rep. September 1514. Counsel stressed that operational decision to replace and cancel suspended courses was taken October 31, 1984 and the process of notifying full-time faculty of the replacements/ cancellations was virtually complete before the legislation was enacted. Moreover, counsel emphasized the context in which many of the decisions had to be taken, namely, the disruption and pressures occasioned by the strike, and argued that the details pointed to by counsel for the complainants reflected the benefit of hindsight. It was argued that the discrepancies in the testimony of the respondent's witnesses were minor and to be expected and that the documentary evidence well in advance of the legislation supported the College's position. Counsel also noted that all full-time faculty whose courses had

been cancelled (except for Hopkins) had been offered extension courses in the Winter 1985 semester, although some declined. With respect to Hopkins, counsel asserted Hopkins should not be regarded as a credible witness. Rather, the accounts given by the respondent's witnesses indicated that the cancellation in the Fall 1984 semester and Crombie's decision not to permit Hopkins to teach in the Winter 1985 term were in no way related to Hopkins' union activities, including his commentary on the labour representative on the Board of Governors.

26. Counsel for the respondent also raised a preliminary objection that there was no *prima facie* case. The Board reserved its ruling on the motion. Counsel argued that the effect of a unique provision in section 59(2) of the CCBA whereby all employees in the bargaining unit were deemed to be on strike was to render it impossible for an employer to violate section 75(2)(c). That is, given the employees were deemed to be on strike, an employer could not compel the employees not to exercise their rights, including the right to strike. Counsel for the complainants opposed that position arguing, *inter alia*, that the complainants also raised section 75(2)(a). It was contended the legislation did not intend to permit an employer to simply delay a "penalty" until after a strike without violating the CCBA as, at the very least, such a "message" could well inhibit future exercise of an employee's rights. In reply, counsel for the respondent noted that the tense of section 75(2)(a), "is exercising" did not support the complainant's submissions.

27. Sections 65 and 75 of the CCBA read:

65. Every person is free to join an employee organization of his own choice and to participate in its lawful activities.

75.-(1) No person who is acting on behalf of the Council or an employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the Council or an employer or any person acting on behalf of the Council or an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

(2) The Council, an employer or any person acting on behalf of an employer shall not,

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;
- (b) impose any condition on an appointment or in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act;
- (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act,

but no person shall be deemed to have contravened this subsection by reason of any act or thing done or omitted in relation to a person employed in a managerial or confidential capacity.

(3) No person or employee organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employee organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

28. It is not in dispute that the CCBA does not contain a reverse onus provision comparable to section 89(5) of the *Labour Relations Act*. Nonetheless, the Board must determine whether the employer's conduct which has been impugned resulted, even in part, from anti-union animus regardless of whether there does or does not exist just cause for that conduct: *Durham College of Applied Arts and Technology*, [1979] OLRB Rep. Nov. 1077. In reaching that determination, on the balance of probabilities, the Board must take into account the circumstances of each case and make all reasonable inferences from the evidence: *National Automatic Vending Co.*, *supra*.

29. The replacement of courses taught by full-time faculty in the extension program, where possible, and the cancellation of the remaining courses does give rise to a suspicion the decision to do so was at least partially influenced by anti-union motive, that is, in response to the legal strike by those full-time faculty. That suspicion is somewhat enhanced given the timing of the cancellations, namely, in close conjunction with the legislation ending the strike and ordering the teachers back to work. Moreover, in Wicke's course, for example, the bulk of the course, because of the practicum component, had already been completed and the course itself would likely have been finished in its entirety before the Christmas 1984 break. That course was also required for the technician's diploma. Yet, the cancellation of this course was not rescinded. In this context, then, the Board must subject the reasons proffered by the College and the circumstances to the most rigorous scrutiny.

30. The legal strike by full-time faculty commenced October 17, 1984. By the virtue of the CCBA, faculty were deemed to be on strike and payment of wages and benefits was prohibited. Those courses taught by full-time faculty in the extension program were also suspended. In the Board's view, it is improbable that Del Missier told students in the classes which were to be suspended that, following the strike, the faculty would just "pick up where they left off". Del Missier's recollection that she reiterated the College's official position is preferred. At that point, of course, the eventual duration of the strike was unknown. Moreover, the official position of the College was that students remained registered in the courses but, if the strike was lengthy, they would be notified about applying for a refund (see paragraph 7). Thus, even at the strike's commencement, there was a prospect of a refund to students (implying a course cancellation) depending on the length of the strike.

31. The steps taken by the College to monitor those extension courses which were continued, to establish an evaluation committee to regularly assess the impact of the strike and to set a date in two weeks to review matters if the strike was continuing, in the Board's opinion, were reasonable and untainted by improper motive. That two week review occurred on October 31, 1984 in a meeting between Crombie and Derks where Crombie decided to initiate the process to seek replacements for the suspended courses. At that date, the strike was still extant and there was no prospect of an early cessation to the work stoppage through negotiation or legislation. The Board finds nothing contrary to the CCBA in Crombie's decision. The College was merely acting, as it was entitled, to minimize the disruption to its operation as a result of the strike through *bona fide* means. According to Crombie, the decision responded to a number of complaints by students seeking completion of the courses by Christmas, that is, Crombie felt the College should adopt that date as a target for completion of the suspended courses. For that to be realistic, the courses could be suspended no longer than necessary to get replacements. The Board does not regard the fact that a very few courses where replacements were found continued into early January once the Fall term was extended as casting doubt on the *bona fides* of the original decision. On November 2, following her meeting with Crombie, Del Missier commenced the implementation of the decision by contacting potential replacements. By the following Monday, November 5, a number of replacements had given commitments to complete the courses and, indeed, some had commenced teaching that week.

32. Late in the afternoon of Thursday, November 8, the back to work legislation was introduced. Earlier that day, Del Missier had commenced the unpleasant task of notifying full-time faculty of the cancellations or replacements. The Board has carefully reviewed the evidence as to when the College would have firm knowledge of the imminent end of the strike. In the Board's view, it is very unlikely the back to work legislation was known of before Thursday mid-day. However, the Board does not regard the precise timing of that awareness on Thursday or even late Wednesday as critical. Rather, the Board accepts Crombie's testimony that the cancellation decision was implicit in the replacement exercise. It is not logical to conclude otherwise. The College, in seeking replacements, was committed to resolving the matter of suspended courses through replacements wherever possible and cancellation where replacements could not be found. It is true that Derks and Del Missier placed the instructions to them to cancel the remaining courses on late Wednesday or early Thursday morning. The parallel process of the Registrar's office in notifying students of the cancellation also commenced in that time frame. But, Lake places his knowledge of the cancellation several days prior to that. The Board finds that the decision to seek replacements, which admittedly well pre-dated knowledge of the legislation, included the cancellation of those remaining courses implicitly. That that implication did not become an express instruction to Del Missier until November 7 or early on November 8 was not unreasonable or suspicious given that her energies until that point had been directed to finding as many replacements as possible.

33. The conclusion that the replacement/cancellation decision was not tainted by improper motive does not end the matter. The Board must still determine whether, once the legislation was introduced and/or enacted, the decision not to "replace the replacements" or, at least, to reinstate the suspended courses where no replacements were found was tainted by anti-union motive.

34. The Board concludes that the reasons given for not "replacing the replacements" constituted the sole rationale. That is, the College had just gone through the process of hiring replacements, those individuals had given commitments to complete the particular course involved for that term in admittedly difficult circumstances and the College did not consider it appropriate or seemingly to renege on that contract. Further, the students had already been notified that the courses would continue and, in some instances, had agreed to a timetabling change to accommodate the replacement. As noted, some of the replacements had already commenced teaching by the date the legislation was enacted.

35. The Board is also satisfied that the decision not to rescind the cancellation directive for the remaining courses taught by full-time faculty was not influenced by improper motive. In the College's view, full-time faculty faced stressful circumstances in which to complete their normal teaching load given the legislated end to the strike and the abrupt order to resume classes. The College was focusing on the larger issue of restarting the regular program and, in comparison, the issue of the relatively few extension courses involved was not significant. The Board accepts Crombie's explanation that he generally was not aware of the details of some of the courses involved, such as that taught by Wicke, but that, when asked by Derks if the decision to cancel would be rescinded, concluded that, on grounds of overall fairness, the decision to cancel should be upheld. The College's explanation for the cancellation must be judged in the context of the circumstances at the time, not with the benefit of hindsight. Whether there were errors or whether the benefit of hindsight would have resulted in a different decision is not the issue. Rather, the *bona fides* of the decision at the time is the question before the Board. The Board finds that the decision not to rescind the cancellation order was based on a desire for consistency amongst courses for which no replacements had been found and not to penalize the faculty involved. Further, it should be stressed that students had already been notified of the cancellations and refunds were in process. The Board also comments that, in its view, the explanations given by the various witnesses for the College were not inconsistent, although the emphasis on various aspects may well have reflected

the particular viewpoint of each witness. Finally, the Board notes that all of the complainants (except Hopkins) were offered teaching in the extension program in the Winter 1985 session and that, in fact, most have taught since the Fall 1984 semester.

36. The Board next examines the circumstances in which Hopkins' courses in the Fall 1984 semester and the Winter 1985 semester were cancelled. As noted in paragraphs 17 and 18, the Board accepts Del Missier's account of her conversations with Hopkins and the latter's assurance that there would be ten registrants in the course to comply with the policy. It was reasonable for Del Missier to rely on that assurance to authorize a course and not to "double-check" with the Registrar. The review of all extension programs revealed only eight students in Chemistry I. The Board finds that the decision to cancel Hopkins' course was solely because of the low enrolment. Further, the failure to notify Hopkins immediately was reasonable given the ongoing strike.

37. The Board does not accept a sinister interpretation of the fact that Del Missier's handwritten notes in preparation for the course listing/replacement exercise were written in different coloured pens and in pencil, nor in the fact that the course listing (Exhibit 21) included Chemistry I with a notation "This course has officially been cancelled; insufficient enrolment". Del Missier testified there were frequent telephone calls and other interruptions when she prepared such reports or lists. On returning to her task, she simply picked up a writing instrument without regard to its colour to prepare her rough drafts. This explanation is compelling given the Board's assessment of Del Missier as a witness and a review of her other rough work tendered in evidence. Moreover, the Board is of the view that the inclusion of Chemistry I in the listing with the appropriate explanation on the face of the document reflects no more than Del Missier's thoroughness in preparing a schedule of *all* courses suspended because of the strike. It was not an unreasonable act to include a course which was suspended at the start of the strike and which was *later* cancelled.

38. The Board finds that the opposition by Derks and Del Missier to Hopkins' teaching in the Winter 1985 semester was based on their view of his conduct regarding the Fall 1984 enrolment in Chemistry I and his past relationship with the support staff. Their position regarding Hopkins was clear in the December meeting with Lake to review the Winter 1985 potential instructors, that is, before the "Board of Governors" issue arose. Moreover, both women testified they were unaware of Hopkins' strike activity beyond seeing Hopkins and other full-time faculty on the picket line.

39. When Derks learned Hopkins was scheduled to teach one course and share another in the Winter 1985 term, the situation was brought to Crombie's attention. The Board has no doubt that Crombie's decision that Hopkins was not to teach was based on Crombie's assessment that Hopkins' conduct overall in dealing with the extension staff had not been professional or appropriate. In Crombie's words, the duties of Derks and Del Missier were tough enough without having to put up with that foolishness. As stated in paragraph 28, the establishment by the employer of "just cause" for its action is neither required nor sufficient if the real reasons included anti-union animus. In the instant case, the Board finds that Crombie's decision to support the position of Derks and Del Missier was unrelated to Hopkins' union activity or the Board of Governors' position. Indeed, the evidence indicated that other full-time faculty extensively involved with the strike and related union activity had not been penalized for such activity. With respect to the Board of Governor's appointment, in the Board's view, there was no causal link established between that issue and Crombie's decision. Rather, the recommendation for the labour appointment was apparently quite controversial within the labour council and, further, the Council of Regents, on at least one occasion in the past, had not followed recommendations from similar groups. The Board notes that Hopkins was informed that he should see Crombie directly to learn the reasons for the decision but Hopkins chose not to do so. It is also clear that Hopkins preferred to read into Lake's

non-committal responses during their conversations in late January/early February 1985 a conclusion that he (Hopkins) was the victim of anti-union feeling rather than meeting Crombie, as directed, to learn the actual reasons. Parenthetically, the Board notes the Chemistry I and Physics I courses had well below the minimum number of registrants. The Board comments, too, that, following discussions between Crombie, Lake and Derks in August 1985 and the ensuing memo adverting to the earlier matters, Hopkins was offered Chemistry I in the Fall 1985 term although this course was eventually cancelled for low enrolment.

40. The Board need deal only briefly with two other matters. There was a discussion between Crombie, Lake and Wilson in October 1984 dealing with the issue of whether full-time faculty should teach in the extension program. The question of full-time faculty in the extension program had been raised periodically. According to the resulting policy, full-time faculty were generally to be limited to one extension course per semester and any additional course, where there was no alternative instructor, for example, required the approval of the appropriate divisional director. In the Board's view, this matter is not relevant to the issue before the Board as the consideration of this policy was unrelated to the strike and the replacement/cancellation exercise. Secondly, with respect to the respondent's preliminary motion, the Board doubts that section 59(2) of the CCBA precludes the violation of section 75(2) as asserted by the respondent. The adoption of the respondent's argument, in the Board's opinion, would emasculate the protections accorded the employees in section 75 of the CCBA. In view of the Board's decision on the merits, however, the Board need not finally determine this preliminary objection.

41. In summary, having reviewed the testimony, including the extensive documentary evidence, the Board finds that neither the cancellation of the courses taught by full-time faculty in the extension program in the Fall 1984 semester nor the decision that Hopkins should not teach in the Winter 1985 term was tainted by anti-union motive. For the foregoing reasons, then, the complaints are hereby dismissed.

0812-86-R Ontario Catholic Occasional Teachers' Association, Applicant, v. Carleton Roman Catholic Separate School Board, Respondent

Bargaining Unit - Pre-Hearing Vote - Disagreement about bargaining unit description for purposes of pre-hearing vote - Board not obliged to define voting constituency so as to cover units proposed by both parties - Whether determination under s.9(2) should be delayed pending notice of application to affected employees

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *B. L. Armstrong* and *D. A. MacDonald*.

DECISION OF THE BOARD; August 26, 1986

1. The name of the respondent in the title of this application is amended to read: "Carleton Roman Catholic Separate School Board".
2. This is an application for certification filed on June 19, 1986, in which the applicant has asked that the Board conduct a pre-hearing representation vote.

3. The applicant claims that the unit of employees of the respondent appropriate for collective bargaining in this matter would be described as follows:

All occasional teachers employed by the respondent in its schools in the Regional Municipality of Carleton save and except those employees teaching in schools pursuant to Part XI of the Education Act and those employees in bargaining units for which any trade union holds bargaining rights as of the application date.

In its reply, the respondent describes the appropriate bargaining unit this way:

All qualified and unqualified occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton, save and except those employees teaching in schools pursuant to Part XI of the Education Act, those employees in bargaining units for which any trade union held bargaining rights as of June 19, 1986, being the date of application, including teachers with probationary or permanent teaching contracts with the respondent.

4. The employment of "teachers" by school boards is governed by several statutes, including the *Education Act*, R.S.O. 1980 c.129, as amended. The term "occasional teacher" comes from the *Education Act*, which in subsection 1(1) defines that term as follows:

31. "occasional teacher" means *a teacher* employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year;

[emphasis added]

Subsection 1(1) of the *Education Act* defines the word "teacher" as follows:

66. "teacher" means a person who holds a valid certificate of qualification or a letter of standing as a teacher in an elementary or a secondary school in Ontario;

As we understand the lexicon of school board employment relations, the word "qualified" means "having the qualifications described in clause 66 of subsection 1(1) of the *Education Act*." On that view, "occasional teachers" are, by definition, "qualified" and the phrase "unqualified occasional teacher" is, strictly speaking, a contradiction in terms. It appears from the material before us that the respondent intends the phrase "unqualified occasional teachers" to refer to unqualified persons employed on an emergency basis (pursuant to section 22 of Regulation 262, as amended) or pursuant to a letter of permission granted by the Minister of Education, whose duties involve "teaching as a substitute for a permanent, probationary or temporary teacher".

5. Collective bargaining between school boards and "teachers with probationary or permanent teaching contracts" (hereafter referred to as "contract teachers") is governed by the *School Boards and Teachers Collective Negotiations Act* R.S.O. 1980, c. 464 (often referred to as "Bill 100") and not the *Labour Relations Act*. Bill 100 assigns bargaining rights for such teachers to branches of the affiliates of the Ontario Teachers' Federation. In the case of teachers in separate schools (other than those teaching in schools pursuant to Part XI of the *Education Act*), the relevant affiliate is the Ontario English Catholic Teachers Association ("OECTA"). Such teachers would, as a result, be "employees in bargaining units for which any trade union held bargaining

rights of as of June 19, 1986" when performing the duties contemplated by their permanent or probationary teaching contracts.

6. At first glance, the parties' disagreement about the bargaining unit description concerns only the inclusion or exclusion of unqualified persons employed to perform the duties contemplated by the definition of occasional teacher in the *Education Act*. It appears, however, from the report of the Labour Relations Officer who met with representatives of the parties and from subsequent written representations filed with the Board by their counsel, that the respondent seeks the exclusion from any bargaining unit of occasional teachers of those of its employees who, in addition to their work as "occasional teachers", teach on a part-time basis pursuant to permanent or probationary teaching contracts. The applicant takes the position that such persons should fall within the appropriate unit of occasional teachers when they perform the work contemplated by the definition of "occasional teacher" in the *Education Act*. Counsel for the respondent describes the party's disagreement on this issue in the following way:

The application affects three identifiable groups:

- (a) qualified occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton;
- (b) unqualified occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton;
- (c) qualified occasional teachers who are members of another union, namely, the Ontario English Catholic Teachers' Association.

The applicant seeks to include in its proposed unit all persons included in (a) and (c) above.

The respondent seeks to include in its proposed unit all persons included in (a) and (b) above.

7. The respondent has filed three lists of employees: a list of 184 persons said to be "qualified" occasional teachers who do not have permanent or probationary teaching contracts with the respondent, a list of 56 "unqualified occasional teachers" and a list of 22 persons who are employed both as occasional teachers and pursuant to permanent or probationary teaching contracts. The report of the Labour Relations Officer who met with representatives of the parties indicates that the applicant challenges 8 of the 184 names on the first-mentioned list. It did not challenge any name on either of the other two lists, but purported to reserve its right to challenge names on the list of unqualified occasional teachers in the event the Board were to decide to include them in the appropriate bargaining unit.

8. Section 9 of the *Labour Relations Act* provides as follows:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote

taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

The Board's function at this stage of the proceedings is to make the determinations contemplated by subsection 9(2) of the Act. The Board does not at this point determine the composition of the appropriate bargaining unit. As appears from subsection 9(4) of the *Labour Relations Act*, that determination is only made after the vote is conducted, when all interested persons will be notified in Form 71 of the contents of the Returning Officer's report and of their opportunity to make representations and have a hearing before the Board with respect to any matter concerning the application for certification or the pre-hearing representation vote. Although the appropriate bargaining unit is not determined by the Board until after a pre-hearing vote has been conducted, the positions of the parties with respect to that issue are considered in striking the voting constituency or constituencies at the pre-vote stage, because a pre-hearing vote is of little use unless one can reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board: *Scarborough General Hospital*, [1984] OLRB Rep. Dec. 1765. This is ordinarily facilitated by defining the voting constituency so as to include all those employees who fall within any proposed bargaining unit description and directing segregation of ballots cast by employees who do not fall within every proposed bargaining unit description. It is not always possible to do that. Trade unions organize with a view to the bargaining unit which they believe will be found appropriate by the Board. Where there is a substantial difference between that bargaining unit and the bargaining unit proposed by a respondent employer, the trade union's membership evidence may not be sufficient to create the requisite appearance support under subsection 9(2) in the most broadly defined voting constituency. When such situations arise, it is important to bear in mind that the Board is not obliged to define the voting constituency so as to cover the extremes of the positions taken by the parties: *Satin Finish Hardwood Floorings (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602.

9. The respondent argues that we should not make any determination under subsection 9(2) at this time for the following reasons:

- (1) if the appropriate bargaining unit includes qualified and unqualified occasional teachers as well as those part-time permanent teachers who also teaches occasionals, then the applicant would not appear to have the support of thirty-five per cent of those employees; and
- (2) notice of this application has not been given to affected employees, nor to the Ontario English Catholic Teachers Association, of which at least some affected employees are members.

The problem of notice to employees was first raised in the respondent's letter to the Board of June 27, 1986, in which it said it had received notice of this application on June 25th and noted that "although the [respondent] Board would technically post the Form 7 notices in all our schools, they would not have been seen by any occasional teachers since the school year is now over." In his submissions by letter of August 1, 1986, the respondent's counsel also points to the fact that the inclusion or exclusion of members of OECTA is an issue, states that "the problem facing the Board is that because no notice has been posted, the position of the Ontario English Catholic Teachers' Association is not known at this time", and submits that the Board should adopt the following procedure:

- (1) Form 7 notices to be posted the first week in the school year commencing September, 1986;
- (2) Notice of the Application be directed to the Ontario English Catholic Teachers' Association;
- (3) Following posting of notices and any responses and statements which might thereby result, that Dale Gordon or another Labour Relations officer be once again appointed to consider the position of the parties and to determine the appearance of support, based upon those positions.

10. Paragraph 7 of Form 10 - the Reply required of a respondent to a certification application - asks for the name and address of any trade union known to the respondent as claiming to be the bargaining agent of or to represent any employees who may be affected by the application. In view of the extensive representations by respondent's counsel about OECTA's interest in the matter, it is curious, to say the least, that the answer to paragraph 7 in the Reply filed and signed by the respondent's solicitors is "N/A". Strictly speaking, bargaining rights for those members of OECTA who are employed by the respondent would be exercised by a branch affiliate of OECTA. This Board does not maintain records of the addresses for service of all branches of affiliates of the Ontario Teachers Federation. In this case, however, notice to OECTA of this application was sent by mail addressed to OECTA "c/o Carleton Roman Catholic Separate School Board" at the respondent's address, no doubt in the expectation that the respondent would forward it to the address to which it sends its own correspondence with OECTA. In these circumstances, we are troubled by the categorical statement of respondent's counsel that OECTA has had no notice of these proceedings. We note that counsel for the applicant asserts that OECTA has had "*de facto*" notice and has chosen not to intervene. In these circumstances, the respondent is directed to advise the Board *immediately*, by telegram and letter, of the name and address of the branch affiliate of OECTA which it claims would have an interest in this matter. Upon receipt of that information, the Registrar shall send copies of the Board's original notice to OECTA and of this decision to the name and address supplied.

11. With respect to the matter of notice to employees themselves, we note again that the only determination being made at this stage is whether a pre-hearing representation vote ought to be conducted and, if so, how. The use, *if any*, to which the results of such a vote may ultimately be put will be decided only after all interested persons have had notice and the opportunity of a hearing. Affected employees will be given notice of any such vote and, following the vote, further notice of their opportunity to make submissions and request a hearing by the Board with respect to the application. Notice will be given by mail in accordance with the Board's usual practice on occasional teacher applications, and copies of the original Form 7 notice can be added to the material mailed to employees.

12. In the result, OECTA and the affected employees will receive a notice of this application before any vote is conducted and well before any decision is made which affects the rights of any of them. Any remaining question of the adequacy of notice to employees or to OECTA can be raised at the appropriate time after the vote by those with standing to do so: see *University of Ottawa*, [1986] OLRB Rep. March 353 at paragraph 7. We do not accept the respondent's submission that the Board's determination under subsection 9(2) should be delayed by reason of problems it imagines other parties may have as a result of the way that notice of this application has been given to date.

13. We also do not accept the respondent's submission that no determination under subsection 9(2) should be made because the applicant does not appear to have the requisite membership

support if the voting constituency is defined to include each person who is said to have been employed at the relevant time in either of the bargaining units proposed by the parties. Nor do we accept the submission of counsel for the applicant that it is somehow entitled to a pre-hearing representation vote in that broadly defined voting constituency because past Board decisions support the applicant's position on the description of the appropriate bargaining unit. That submission ignores the plain language of subsection 9(2). The Board cannot direct a pre-hearing representation vote in a voting constituency in which the requisite membership support does not appear from an examination of the records of the applicant and the respondent. In this case, however, it would not be inappropriate to adopt the applicant's bargaining unit description as the voting constituency for the purpose of a pre-hearing representation vote. It does appear from the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in that voting constituency were members of the trade union at the time the application was made.

14. Accordingly, the Board directs that a representation vote be taken among the employees of the respondent in the following voting constituency:

All occasional teachers employed by the respondent in its schools in the Regional Municipality of Ottawa-Carleton, save and except those employees teaching in schools pursuant to Part XI of the *Education Act*, and employees in any bargaining unit for which a trade union held bargaining rights as of June 19, 1986.

For the purpose of clarity, the term "occasional teacher" in this description of the voting constituency has the meaning assigned to it by clause 1(1) 31 of the *Education Act*, R.S.O. 1980 c.129, as amended.

15. All employees of the respondent in the voting constituency on July 3, 1986, who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Ballots cast by any person alleged to be party to a permanent or probationary teaching contract with the respondent will be segregated.

16. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

17. As the result of the vote may be meaningless if the Board ultimately determines that the appropriate bargaining unit for the purpose of this application would include "unqualified occasional teachers", the ballot box shall be sealed and none of the ballots cast counted until further order of the Board.

18. In cases of this kind, respondent school boards are required to supply lists of the names and addresses of all eligible voters. This requirement was brought to the respondent's attention when the Board's labour relations officer met with the parties on July 8 and 23, 1986. Her report notes the respondent's agreement that the necessary mailing list and mailing labels will be forwarded to the Board. The respondent is directed to forthwith forward the necessary mailing list and two sets of mailing labels to the Board and to forward a copy of the mailing list to the applicant trade union. The Registrar is directed to include copies of the original Form 7 notice with the material to be forwarded to employees notifying them of the vote arrangements.

19. All other matters relating to the vote are referred to the Registrar.

0347-86-R Richard Grandy, Applicant, v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, Respondent, v. **City Plumbing (Kitchener) Limited**, Intervener

Practice and Procedure - Termination - Only one employee need exist to file termination application - Challenge to list untimely - Representation vote directed

BEFORE: R. A. Furness, Vice-Chairman, and Board Members B. L. Armstrong and J. Wilson.

APPEARANCES: Ian S. Campbell and Richard Grandy for the applicant; Stanley Simpson and Tom Crystal for the respondent; no one for the intervener.

DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON;
September 2, 1986

1. The name of the Intervener is amended to read: "City Plumbing (Kitchener) Limited".
2. The applicant has applied to the Board under section 57(2) of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.
3. This application was filed on April 18, 1986. The respondent and the intervener are bound by a provincial collective agreement between The Ontario Pipe Trades Council and the Mechanical Contractors Association of Ontario. This provincial collective agreement became effective on May 14, 1984, and remained in effect until April 30, 1986. Having regard to the provisions of section 57(2) of the Act, the Board finds that this is a timely application to terminate the bargaining rights of the respondent.
4. At the hearing the parties agreed that the bargaining unit of employees for which the respondent is the bargaining agent is described as:

All plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices and welders in the employ of the intervener in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.
5. Richard Grandy gave evidence concerning the origination, preparation and circulation of the statement of desire which was filed in support of this application. The statement of desire contained one signature, the signature of the applicant. The intervener filed a Schedule "A" which contained the name of Richard Grandy and a Schedule "C" which contained the name of an employee who had been laid off on April 18, 1986, and whose date of return was unknown.
6. The respondent argued that there must be more than one employee in the bargaining unit on the date of the making of the application before the Board could entertain an application to terminate the respondent's bargaining rights. The respondent relied upon the decision of the Board in *Stuart Riel Masonry Contractor*, [1984] OLRB Rep. Nov. 1630. The respondent also alleged that the application was sponsored by the intervener and should therefore be dismissed. The respondent did not file any particulars of its allegations.

7. The decision in *Stuart Riel Masonry Contractor* does not advance the argument of the respondent. It does not address the issue raised by the respondent. However, that decision does state at page 1634:

In the construction industry, because of the short term nature of the employment relationship, it has been the consistent policy of the Board over many years to count as employees only those employees at work on the application date. This applies equally to applications for certification and for termination of bargaining rights.

The Board has entertained applications to terminate bargaining rights where there has been only one employee in the bargaining unit on the date of the application. For example, in *A.R. Milne Electric Ltd.*, [1982] OLRB Rep. June 911, the Board was faced with this situation and after reviewing the provisions of section 57(2) stated at page 912:

2. In the instant case, there is only one employee in the bargaining unit, and for this reason the respondent union argues that no termination application can be brought. The union points out that on a certification application, the Act prevents the Board from determining an appropriate bargaining unit unless such unit consists of more than one employee; moreover, the term “bargaining unit” is defined in section 1(1)(b) to mean a “unit of *employees* (plural) appropriate for collective bargaining”. The union argues, by analogy, that if two employees were required for a bargaining unit to be certified, bargaining rights cannot be extinguished unless there are at least two employees in the unit. The union also questions whether there is a bargaining unit at all in this case, when the definition of that term appears to require a collectivity.

3. We cannot accept these contentions. In the construction and related industries, the number of employees in a bargaining unit can fluctuate substantially, and from time to time, the bargaining unit may even be vacant. Indeed, section 121 of the Act contemplates that the parties can negotiate a collective agreement even if there are no employees in the bargaining unit at the time the agreement is entered into. It is inconsistent to assert as the union does that there is no “bargaining unit”, while at the same time maintaining that it continues to represent the applicant employee; and, we would not lightly embrace an interpretation which could conceivably lock an employee, unwillingly, into a bargaining unit with no possibility of escape, even in the “open period” prescribed in section 57(2)(a). In our view, such submission is entirely inconsistent with the scheme and purpose of the Act. Section 57(2) provides that *any of the employees* in the bargaining unit may make a timely application to terminate bargaining rights, and we are satisfied that the applicant has properly done so here.

The same reasoning is equally applicable in the instant application and the Board finds that it has jurisdiction to entertain the instant application to terminate the bargaining rights of the respondent.

8. Mr. Grandy has been employed by the intervener as a plumber for three years. He signed the statement of desire in his lawyer’s office after he had absented himself from work with the excuse that he had a dental appointment. He contacted his lawyer through the lawyer referral service in Kitchener. On his lawyer’s advice, he became a member of the respondent before he filed the instant application.

9. After the conclusion of certain other proceedings before the Board, Gary McNeil, a director of the intervener, informed Mr. Grandy that he would have to join the respondent or be replaced by a member of the respondent. Mr. Grandy did not wish to become a member of the respondent and did so only after his lawyer had advised him to do so. Mr. Grandy met Grant Kay, a member of the respondent who worked in his own business, at a plumbing and supply shop prior to the filing of this application. This meeting occurred in the course of a working day as Mr. Grandy obtained supplies. Mr. Kay advised Mr. Grandy that the respondent was going to make an example of Gary McNeil and that the only way to prevent this was to get the intervener out of the industrial, commercial and institutional sector of the construction industry. The respondent argued that

this conversation was evidence which affected the voluntariness of the statement of desire. There is no evidence that the intervener was in any way responsible for this conversation. On the other hand, the balance of the evidence established that the idea to file this application was the decision of Mr. Grandy and arose as a result of his antipathy towards the respondent. The Board is satisfied on the balance of probabilities that the statement of desire represents the voluntary wishes of Mr. Grandy.

10. The respondent also challenged the list of one employee on Schedule "A" on the ground that Mr. Grandy was not working in the industrial, commercial and institutional sector of the construction industry on the date this application was made. The appropriate and proper time to raise such a challenge is when the list is announced. The respondent raised its challenge during the representations of the parties after the count and the evidence had been presented to the Board. During his testimony, Mr. Grandy stated that only ten per cent of his work was in the commercial field. There was no evidence before the Board that Mr. Grandy was not working in the industrial, commercial and institutional sector of the construction industry and the Board is not prepared to entertain the speculative challenge of the respondent to the list at the time of the proceeding when it was made.

11. On the basis of the evidence and representations before it, the Board is satisfied that not less than forty-five per cent of the employees of the intervener in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on May 29, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

12. The Board directs that a representation vote be taken of the employees of the intervener. Those eligible to vote are all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices and welders in the employ of the intervener in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, and persons above the rank of non-working foreman on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

13. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervener.

14. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER B. L. ARMSTRONG;

1. I dissent.

2. Subsection 57(2) states, in part:

57.-(2) Any of the employees in the bargaining unit defined in the collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit...

In my opinion, the language of the subsection clearly reveals the intention of the Legislature that the Board should not entertain a termination application where, at the time the application is

brought, a single employee is, because of the vagaries of the construction industry, in the bargaining unit. I note that the subsection states “any of the *employees*” [emphasis added] and not “any employee”, which should have been the case had the Legislature intended termination of a single person unit. The words “in the bargaining unit” strengthen this conviction: pursuant to subsection 1(1) of the Act, a bargaining unit is a unit of *employees*. Subsection 57(2) makes this clear in its reference to “the *employees* in the *bargaining unit*” [emphasis added]. I note that subsection 57(3) also implies a plurality of voter in its reference to “employees in the bargaining unit”, and that subsection 57(4) refers to “a majority of the ballots cast”. The taking of a representation vote would be rendered negatory where a single person who has brought the application has already signified opposition to the union. To give any meaning to subsection 57(4), the vote must be of two or more employees.

3. Contrary to what the Board stated in *A. R. Milne Electric Ltd.*, [1982] OLRB Rep. June 911, such an interpretation would not “lock an employee, unwilling, into a bargaining unit with no possibility of escape”. Collective bargaining is premised on majoritarianism. Where a single employee is not entitled to decide the fate of the relationship under subsection 6(1), why should the same not apply to subsection 57(2)? A single employee in a bargaining unit need not be a permanent state of affairs. To prevent a termination application by a single employee merely postpones the application until a more representative number of employees are present in the unit. Why allow a single employee to determine the fate of the unit where a greater number have originally signified their desire to bargain collectively?

4. In *A. R. Milne Electric Ltd.*, the Board stated at page 913:

Of course, employer antipathy to trade union representation is neither unusual, nor, in itself, illegal; but, given the power of the employer to influence the wishes of his subordinates, the Board must be especially scrupulous in its concern to protect the right of those subordinates to make their own choice, as distinct from that of their employer, in the matter of trade union representation -- especially in a small bargaining unit where employee wishes (whether on the application itself or in a representation vote) will be clearly identified.

This portion of the Board’s decision identifies further areas of concern. A single employee is less likely to be able to withstand the *implicit* opposition of the employer to collective bargaining, even in the absence of overt interference or involvement in the termination application. The very fact that the Legislature has given sanction to collective bargaining indicates an awareness that the ‘bargaining relationship’ between a single employee and his or her employer is unlikely to be conducted on the basis of equal strength or bargaining power. To permit a single employee termination is to open the door to employer abuse, especially since the employer through the process of hiring and layoff can determine who the single employee will be.

5. Finally, the result advocated by the majority of this panel would make a mockery of an important principle of collective bargaining; the right to freely choose to belong, or not to belong, in a collective bargaining relationship, and that right to freely choose guaranteed by secret ballot. The importance attached to this principle is reflected in subsection 111(1) of the Act, which states:

111.-(1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

In *Daheim Nursing Home Limited*, [1980] OLRB Rep. Nov. 1639, the Board stated at page 1640:

Board representation votes are conducted in accordance with strict standards designed to ensure that employees have an opportunity to register a free and untrammelled choice in the selection of a bargaining representative. Employees must be able to cast their ballots under circumstances that are not only free from improper interference, restraint, or coercion, but also from any other elements which might prevent a free and voluntary choice. *The secrecy of that choice is of fundamental concern.*

[emphasis added]

Form 69, the notice of taking of vote by the Ontario Labour Relations Board, states on its face that "the vote shall be by secret ballot". It goes without saying that the choice of an employee in a single employee unit is made manifest by the result of the vote itself! I would add in passing that the Board, in deciding whether a representation vote will truly reflect the wishes of employees in a section 8 application for automatic certification, takes into account that the unanimity of the ballot box is unlikely to be present in a small unit: see Sack & Mitchell, p. 223, and the cases cited at footnote 683.

6. For these reasons, I dissent with a result which would fly against the clear wording and provisions of the Act, undermine the principle of the secret ballot, and render employee choice vulnerable to employer wishes.

1520-85-R Canadian Paperworkers Union, Complainant, v. DRG Inc., Respondent, v. Group of Employees, Objectors

Certification - Employee - Exhibits introduced by employer to show worker had access to confidential information - All confidential information whited out - Board unable to determine content of documents - Onus on party seeking exclusion of individuals from bargaining unit

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *W. A. Correll* and *D. A. Patterson*.

APPEARANCES: *J. J. Nyman* and *Mike Hunter* for the applicant; *Edward V. Johnson*, *Bob Wilson* and *Rosemary Egremont* for the respondent; *Terry Haines* for the objectors.

DECISION OF THE BOARD; August 27, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* ("the Act").
3. By decision dated October 16, 1985, a differently-constituted panel of the Board directed the appointment of a Labour Relations Officer to inquire into and report back to the Board on the duties and responsibilities of two persons, the status of whom was in dispute between the parties. The two disputed persons are Debbie Standrin, the bookkeeper, and George Kipp, the traffic supervisor. The applicant union sought inclusion of the disputed individuals, while the respondent sought their exclusion under section 1(3)(b) of the *Labour Relations Act*. The objecting employees took no position with respect to the traffic supervisor, but submitted that the book-

keeper should be excluded on the basis that she exercises managerial functions and is employed in a confidential capacity in relation to labour relations matters.

4. The Labour Relations Officer met with the parties and inquired fully into the status of the disputed individuals. On release of his report, the representatives of the parties made submissions with respect to the report.

5. At the hearing, two procedural matters were raised by counsel for the applicant. The first relates to the basis upon which the respondent should be permitted to argue for the exclusion of the disputed individuals with respect to Mr. Kipp. Counsel argued that the respondent had laid his claim for exclusion on the second part only of section 1(3)(b), that Kipp is employed in a confidential capacity. Counsel for the respondent replied that, although he had made a statement at the inquiry that he was relying only on the confidentiality element of the exclusion, the evidence gained through the inquiry is such that he can rely on the managerial aspect, as well. The Board reserved on this issue and entertained submissions on both branches of the section 1(3)(b) exclusion. However, it was not necessary to make a decision on this matter, since even if submissions on the managerial functions element of the exclusion are considered, we would nevertheless include Mr. Kipp in the bargaining unit.

6. The second matter raised by counsel for the applicant involved certain documents placed in evidence by the respondent. These had been admitted by the Officer, subject to the applicant's submissions to the Board on this matter. We find that most of the exhibits are of little evidentiary value, in particular, Exhibits 4, 5, 7, 8, 10, 11, 12, 13 and 14. The exhibits were introduced to show that Standrin, the bookkeeper, had access to confidential information. However, the employer had already blacked or whited out all information it considered to be confidential. The Board was unable to determine the content of these documents and to determine whether or not they were confidential for labour relations purposes. Counsel for the union submitted that if the employer is going to rely on information as being confidential, the employer has the obligation to provide that information to the Board. The complete documents could have been submitted to the Board. Furthermore, counsel contended, it was impossible for him to cross-examine on these documents. We find that we are unable to rely on any of the documents submitted by the employer for the purpose of showing that Ms. Standrin has access to confidential information. The Board has no way of independently verifying the nature of the information claimed to be confidential. Where the Board is able to develop a sense of the nature of the information involved, that information does not always appear to be confidential in the labour relations sense, but confidential with respect to the employer's competitive position vis-a-vis other employers. Given the difficulty in determining the content of these documents, we find them to be of no value. Employers who wish to submit such documents to the Board must be prepared to allow the Board to determine the nature of such information or run the risk of having the documents held to be of minimal or no evidentiary value.

7. We note that the onus is on the party seeking the exclusion of individuals from the bargaining unit: *Ajax Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283; *Inglis Limited*, [1976] OLRB Rep. June 270. DRG Inc. and the objecting employees (with respect to Debbie Standrin) therefore have the onus of showing that Ms. Standrin and Mr. Kipp should be excluded from the unit.

8. Mr. Kipp is the traffic supervisor for DRG Inc. He is responsible for contracting with trucking companies and for overseeing the truck drivers who are sent by the trucking companies with which DRG contracts. Counsel for the respondent made much of the fact that Mr. Kipp was dissatisfied with one of the drivers sent by Burns Transport, a company with which DRG contracts,

and that as a result of his dissatisfaction, the driver did not work for DRG again. Counsel argued on this evidence that Kipp could discipline drivers and thus had control over their economic well-being. However, whatever effect Kipp may have with respect to the drivers of other companies does not constitute control over employees as required by section 1(3)(b) of the Act. Relevant employees must be employees of the respondent who are potentially in the same bargaining unit as the disputed individual. Kipp has no control over any such employees. Counsel also suggested that the fact that Kipp enters into contracts for trucks and drivers with other companies is a managerial function. These are standard contracts and involve no discretion on Kipp's part. Kipp is involved in certain kinds of financial matters and has access to financial material, such as the transportation budget, but this is not confidential in the sense that there would be a conflict if he were in the bargaining unit. This is information which relates more to the employer's competitive position than with the employer's relations with members of the bargaining unit. With respect to individuals who are not involved in exercising any influence on the employment relationship, "the Board looks to whether or not they exercise independent decision-making responsibility in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard or whose independent decisions are circumscribed within predetermined limits set by others or who are limited to technical and procedural decisions flowing from their expertise in a limited field": *Canadian General Electric Company Limited*, [1979] OLRB Rep. Jan. 12, at paragraph 18. Considering all the evidence put forward by the respondent's counsel, we do not find Mr. Kipp to be an employee who "exercise[s] duties and responsibilities requiring, on the one hand, that the employer be given [his] individual loyalty and, on the other hand, that the trade union not be weakened or compromised by [his] inclusion within its ranks": *Inglis Limited*, *supra*, at paragraph 4. Mr. Kipp is therefore included in the unit.

9. Ms. Standrin is obviously an energetic, co-operative and competent employee, who is trusted and valued by her immediate supervisor, Mr. Bob Wilson. But these are not qualities which justify denying access to the collective bargaining process under section 1(3)(b) of the Act: *Inglis Limited*, *supra*. Given the inadequacy of the documentation provided by the employer with respect to the confidentiality branch of section 1(3)(b), it is difficult for the Board to conclude that Ms. Standrin should be excluded from the bargaining unit on that basis, particularly keeping in mind that the onus in these matters is on the party wishing exclusion of the individual from the bargaining unit. Where the Board can reach a tentative conclusion with respect to the nature of confidential information to which Ms. Standrin has access, we find that it is primarily material which concerns the employer's competitive position with respect to other employers and not confidentiality within the meaning of labour relations. During the period of the last three or four years, only a few documents even appear to contain confidential information of any kind which were typed by Standrin or to which she had access. Other documents, such as Exhibits 6, 15, 16 and 18 which detail travel and entertainment expenses or salaries of general office staff are not confidential within the meaning of section 1(3)(b). Knowledge of such information would not put Standrin in a conflict position. Where Standrin might have access to certain kinds of information, such as labour rates, there is no evidence that the information given to her is reflective of the employer's position at the bargaining table and thus of a nature which would place her in conflict were she in the bargaining unit: *RCA Limited*, [1980] OLRB Rep. Sept. 1316. In short, "the Board must be convinced that [employees to be excluded] have regular access to confidential information, and that this information is integral to the collective bargaining process": *Frito-Lay Canada Limited*, [1978] OLRB Rep. Sept. 831. Ms. Standrin's work satisfies neither branch of this test.

10. The major claim by the respondent with respect to the exclusion of Ms. Standrin relates to the work she does in substitution for other employees, rather than her own work. For example, when Mr. Wilson, the controller and her immediate supervisor, is absent, she has attended management meetings and has reported on the financial situation of the company at these meetings.

However, as soon as she has given her report and answered any questions, she leaves the meeting. She does not appear to be substituting in any other way for Mr. Wilson and does not exercise any recommendation or policy-making powers at such meetings. She performs a back-up function to the executive secretary and the personnel administrator and because of that has access to personnel files and types confidential material. This is not sufficient to constitute access to confidential material or to reach the conclusion that the employee is employed in a confidential capacity. The Board has stated before that "[t]he occasional assumption of such duties and responsibilities does not deprive the individual of status as an employee in the bargaining unit": *Airline (Malton) Credit Union Limited*, [1981] OLRB Rep. Nov. 1521, at paragraph 16; also see *York University* [1975] OLRB Rep. Dec. 945, at paragraph 11.

11. Counsel for the respondent submitted that other employees perceive Standrin as management since she keeps attendance and determines overtime. Indeed, this was the position of the objecting employees. However, while the perception of employees is one factor to be considered by the Board, it is not a determinative factor and does not overcome the absence of other objective evidence to support the position that an employee should be excluded because he or she exercises managerial functions. Nor do we find that Ms. Standrin has the kind of control over the economic circumstances of other employees which would warrant her exclusion under the first branch of section 1(3)(b) of the Act. The test for determining whether an employee performs managerial functions is whether the person "makes effective recommendations as regards terms and conditions of employment of other employees": *Inglis Limited, supra*, at paragraph 9. Standrin does not have the power to hire or fire or discipline. Wilson discusses employees informally with Standrin before annual review, but it is clear that Standrin does not make effective recommendations with respect to employees and that any consultation is purely informal. While people may come and ask her for instruction, this would not be unusual with respect to an experienced employee. She does maintain a form of attendance record but this seems to be more in the nature of a recording function, as it was labeled by counsel for the applicant, than a managerial function. She takes minutes at a steering committee and has other input at that committee, but again does not appear to have any policy-making role which would have any impact on employees.

12. On the basis of all the evidence and submissions of counsel for the parties, we find that neither Mr. Kipp nor Ms. Standrin fall within the managerial and/or confidential exclusion and therefore find them to be members of the bargaining unit.

13. The applicant filed nine combination membership receipt cards. Thus, more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 30, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Act, to be the time for ascertaining membership under section 7(1) of the Act. Under such circumstances, the Board would normally exercise its discretion to order certification without a vote. However, two timely statements of desire were filed which contained three signatures of persons who had signed membership cards. Accordingly, the Board is required to inquire into the voluntariness of these statements of desire in order to determine whether the Board should exercise its discretion to order a vote, despite the level of the union's support.

14. The matter is referred to the Registrar to schedule a hearing into the voluntariness of the petition.

15. This panel is not seized with this matter.

1269-86-R Great Lakes Fishermen and Allied Workers' Union, Applicant, v. F. Causarano Fishery Limited, Respondent

Certification - Practice and Procedure - Pre-hearing Vote - Blank Form 9 not preventing Board from acting on appearance of membership evidence to direct pre-hearing vote - Board discussing its role in pre-hearing vote applications

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *D. A. MacDonald* and *D. A. Patterson*.

DECISION OF THE BOARD; September 4, 1986

1. This is an application for certification in which the applicant has requested a pre-hearing vote.
2. The name of the respondent is amended to read "F. Causarano Fishery Limited".
3. In accordance with its usual practice, the Board, by order dated July 30, 1986, appointed Labour Relations Officers to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of an appropriate bargaining unit, the description and composition of the voting constituency, the list of employees as of the terminal date for the purposes of any vote which might be directed and other matters relating to entitlement to and arrangements for such a vote. The officers so appointed met with the parties on August 14, 1986.
4. Pursuant to the direction of the Officers, the respondent has made written submissions with respect to the description and scope of the bargaining unit and the location and time of the pre-hearing vote. The applicant's position is that the pre-hearing vote should be held regardless of the respondent's submissions and the ballot box sealed.
5. The parties disagree on the description and scope of the bargaining unit. The applicant proposes the following unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain". It further submits that the unit include only those employees working on the fishing boat. The respondent's proposed unit is: "all employees of the respondent employed in its commercial fishing operation at Wheatley, Ontario, save and except those above the rank of Boat Captain".
6. The Board does not decide the appropriate bargaining unit in a pre-hearing vote application, but assesses the appearance of support on the basis of the union's proposed unit. The Board therefore determines that the voting constituency will be "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain."
7. The applicant challenges the inclusion in the bargaining unit of John Causarano (Boat Captain) and Francesco Causarano (deckhand). The respondent's position is that both individuals should be included in the unit.
8. Regardless of the status of the disputed individuals, it appears to the Board, having examined the records of both the applicant and the respondent, that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made.

9. If either John Causarano or Francesco Causarano attends to vote, he is to be allowed to vote and his ballot segregated.

10. The respondent's submissions with respect to the location and time of the vote are directed to the attention of the Registrar.

11. A blank Form 9 was filed with this application. In *The Halton Roman Catholic Separate School Board*, [1986] OLRB Rep. July 962, the Board was required to determine whether a Form 9 prepared for one application could be transferred to a subsequently filed application. In holding that the Rules require a fresh Form 9, the Board referred to *Northridge Plastics Limited*, [1986] OLRB Rep. July 1012 in which the Board stated that "[n]either the absence of a Form [sic] 9 declaration nor the presence of a defective one can diminish either the character of cards as records or the appearance of membership they create". The Board does not require a completed Form 9 in order to determine whether a pre-representation vote should be held. However, the Board indicated that the ballot box should be sealed "unless and until an apparently proper Form 9 declaration is filed on consent of the parties or with leave of the Board". We repeat and adapt the comment of the Board in *The Halton Roman Catholic School Board*, *supra*, that the blank Form 9 does not prevent our acting on the appearance of the membership evidence to direct a pre-hearing vote, "however fatal that omission may be if it remains unremedied when this application comes on for hearing".

12. This application is one of several made by the applicant with respect to respondents engaged in fishing in the same general geographical location as the respondent herein. It may therefore be appropriate to comment here on the role of the Board in pre-hearing vote applications. A pre-hearing representation vote is intended to expedite the certification process. To that end, the Board will normally direct that a vote be taken to determine the level of the union's support prior to resolving any disputes between the parties where there is an appearance of sufficient union support in accordance with section 9(2) of the *Labour Relations Act*: see *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989. In ordering a pre-hearing vote, the Board will not reach a decision on any matters in dispute and, indeed, if it is of the view that certain matters must be resolved, because "they are so complex that there is no reasonable utility in conducting a vote before resolving those concerns or issues", it has the discretion not to order a pre-hearing vote: *St. Clair College of Applied Arts and Technology*, [1984] OLRB Rep Dec. 1776. However, some issues may affect the applicant's entitlement to a pre-hearing vote and where these arise, the Board may determine that a pre-hearing vote is appropriate, but order that the ballot box be sealed: *St. Clair College of Applied Arts and Technology*, *supra* and *Noranda Metal Industries Limited*, [1985] OLRB Rep. Sept. 1397. No such issues arise in this application. Nevertheless, because of the nature of the objections made by respondents to other of the applications referred to herein, and because of the potentially prejudicial effect of revealing the outcome of some votes and not others, the Board directs that the ballot box in this application, as in the others, be sealed and not opened until further order of the Board.

13. The Board hereby directs the taking of a pre-hearing representation vote. All employees of the respondent in the voting constituency on August 8, 1986, who have not voluntarily terminated their employment or who have not been discharged for cause between August 8, 1986 and the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether they wish to be represented by the applicant in their relations with the respondent.

15. This matter is referred to the Registrar.

2639-85-R Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. 608379 Ontario Inc. o/a **Fleetwide**, Respondent

Certification - Constitutional Law - Respondent hauling goods for manufacturer but not a licensed carrier nor involved in manufacturing itself - Respondent found to be delivery arm of manufacturer - Operation integral part of manufacturing concern and therefore within provincial jurisdiction

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *Frank Luce*, *Jim O'Donnell*, *Phil Geoffroy* and *Lloyd Padley* for the applicant; *George W. King* and *David Chisolm* for the respondent.

DECISION OF THE BOARD; September 19, 1986

1. This is an application for certification.
2. The respondent challenges this Board's jurisdiction over industrial relations matters involving its employees. The respondent contends that it is carrying on a trucking operation that extends beyond the boundaries of the Province of Ontario, and that therefore legislative jurisdiction relating to its employees rests with the Government of Canada.
3. The respondent was incorporated in April 1985. Its shares are held by two individuals, namely David Chisolm and Patricia Spendlove. It is not a licensed common carrier. Mr. Chisolm had been part-owner of a licensed common carrier which ran into financial difficulties in 1981. These financial difficulties resulted in the liquidation of the common carrier and Mr. Chisolm's personal bankruptcy. These factors may account, at least in part, for the manner in which the respondent carries on operations.
4. Although the respondent is not a licensed carrier, it hauls goods for Fleetwood Metal Industries ("Fleetwood"). The respondent does not haul for any other customer. Fleetwood is an auto parts manufacturer located in Tilbury, Ontario. The respondent hauls some raw materials to Fleetwood's plant, but most of its operations involve transporting parts manufactured by Fleetwood to various automobile manufacturers. Most of this product is transported to locations within Ontario, although approximately one-third of all deliveries are to locations outside the province. Extra-provincial deliveries are generally to locations in the State of Michigan, although some deliveries are also made to locations in Ohio, New York and the Province of Quebec.
5. The respondent commenced operations in Windsor. However, when Fleetwood expressed a desire that the company move to Tilbury, the respondent moved its operations onto the respondent's premises in Tilbury.
6. The respondent employs two dispatchers and a number of drivers. It utilizes four vehicles leased from Ryder Truck Rental. The vehicles are actually leased by Fleetwood and bear the Fleetwood name. When crossing the international border, the respondent's drivers present themselves as Fleetwood employees. Presumably they do so because the respondent is not a licensed carrier and because Fleetwood does not require a license to haul its own products.

7. It is now established law that labour relations *prima facie* fall within the legislative competence of the province as being part of provincial jurisdiction over property and civil rights. See: *Toronto Electric Commissioners v. Snider* [1925] 2 D.L.R. 5 (P.C.). However, the labour relations relating to any federal work, undertaking or business come within the exclusive jurisdiction of the Federal Government. *Reference re Validity of Industrial Relations and Disputes Investigation Act*, [1955] 3 D.L.R. 721 (S.C.C.). Section 92(10)(a) of *The Constitution Act 1867* (formerly *The British North America Act*) provides that the Federal Government has jurisdiction over:

“Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works or Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.”

8. Labour relations matters relating to a common carrier involved in inter-provincial transportation clearly falls under federal jurisdiction. However, different considerations apply where a company is not a common carrier, but rather is primarily involved in manufacturing and processing. When such a company delivers its own product outside the province, it has been held that the delivery operations are an integral part of the total operation and come within provincial jurisdiction. See: *Wm. R. Barnes Co. Ltd.*, [1967] OLRB Rep. Sept. 566; *Catalano Produce Ltd.*, [1975] OLRB Rep. Oct. 743 and *Westburne Industrial Enterprises Ltd.*, [1984] OLRB Rep. Oct. 1525.

9. This brings us to the peculiar circumstances of the instant case. The respondent itself is not involved in manufacturing. However, neither is the respondent a licensed carrier. It carries goods only for Fleetwood in trucks leased by Fleetwood and bearing Fleetwood's name. The respondent's drivers hold themselves out to the border authorities as drivers for Fleetwood. These considerations lead us to conclude that the respondent is not engaged in an independent inter-provincial trucking operation, but rather it serves as the delivery arm of Fleetwood. Its business has no independence or meaning apart from Fleetwood's manufacturing operations. In these circumstances we are led to conclude that it is an integrated part of what is essentially a manufacturing concern and accordingly falls within provincial jurisdiction. It follows that this Board does have jurisdiction to entertain the instant application.

10. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

11. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in Tilbury, Ontario save and except manager, persons above the rank of manager, clerical, office and sales staff, and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on February 10, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

2579-85-U Ontario Nurses Association, Complainant, v. The General Hospital of Port Arthur and Ontario Hospital Association, Respondents.

Arbitration - Evidence - Practice and Procedure - Motion to dismiss complaint without hearing dismissed - Whether Board should defer to grievance arbitration - Board discussing adequacy of particulars in complaints

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *J. Murray* and *J. Sarra*.

APPEARANCES: *Beth Symes*, *David Nicholson*, *Dan Anderson*, *Evelyn Burne* and *Margaret Dyck* for the complainant; *F. J. W. Bickford*, *L. B. Gilman*, *Donna Johnson*, *B. Anderson* and *E. D. Blassio* for the General Hospital of Port Arthur; *Janice Baker* and *Ted Crabtree* for the Ontario Hospital Association.

DECISION OF THE BOARD; August 29, 1986

1. This complaint under section 89 of the *Labour Relations Act* came on for hearing in Thunder Bay on August 19th, 20th and 21st, 1986. The Board first heard submissions from the parties with respect to a number of preliminary objections or "motions" made by the respondents. After hearing from the parties, the Board issued an oral decision as follows:

"This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that the respondent Hospital and Ontario Hospital Association have breached sections 3, 15, 64, 66, 67, 70 and 79 of the *Labour Relations Act* and section 13 of the *Hospital Labour Disputes Arbitration Act*. At the outset there are a number of preliminary objections taken by the respondents in this proceeding. In essence, the respondent Hospital submits as follows:

1. That the allegations, on the face of the "pleadings", do not reveal a prima facie case against it and that the Board should therefore dismiss the complaint pursuant to section 71 of its Rules of Procedure.
2. That the matters complained of relate to and are congruent with a contractual dispute between the parties and that the Board should therefore defer to arbitration.
3. That any discussions between the parties subsequent to January 15, 1986 and which relate to a possible resolution or settlement of the matters in dispute are privileged as being settlement discussions and therefore are not properly raised in this complaint and should be struck therefrom.
4. That the complaint is insufficiently particularized insofar as it is alleged that the Hospital is in breach of its obligations under section 15 of the Act.

The respondent Ontario Hospital Association submits that the complaint is:

1. Untimely, at least in part.
2. That it lacks particularity.

3. That it reveals no *prima facie* case against it, and
4. That it is frivolous and vexatious.

The Ontario Hospital Association urges, through its counsel, that the Board dismiss the complaint against it in its entirety pursuant to its authority under section 71 of the Rules of Procedure or, in the alternative, that the complainant be required to provide further particulars.

The complainant withdraws its allegations that the respondents or either of them have breached section 79 of the Ontario *Labour Relations Act* or section 13 of the *Hospital Labour Disputes Arbitration Act*. It also agrees that the respondent Ontario Hospital Association cannot be in breach of section 15 of the Act since, not being a “party” within the meaning of that provision, it has not duty thereunder (see *Ontario Hospital Association and Hospitals Negotiating Team - CUOE and Participating Hospitals*, unreported decision dated December 15, 1983 in Board File No. 1501-83-U). Consequently, that aspect of the complaint is also withdrawn and is so noted. Other than that, the complainant denies that there is any merit to the preliminary objections or motions.

The complaint herein has been developed or “pleaded” over a period of time. The allegations upon which the complainant bases its case are found in a number of documents which include the following:

- (a) the original complaint dated January 22, 1986;
- (b) a letter dated February 13, 1986;
- (c) a letter dated February 19, 1986;
- (d) a letter dated March 18, 1986;
- (e) a letter dated April 9, 1986, and
- (f) a letter dated July 28, 1986.

The thrust of the complaint seems to be as follows:

1. That the respondent Hospital is in breach of its duty to bargain fairly with the complainant by reason that it did not advise the complainant, either directly or through its bargaining representative the Ontario Hospital Association, that it would, or that it would be possible that it would, discontinue scheduling bargaining unit nurses for extended tours if the complainant was successful in their interest arbitration. The complainant asks that the Board clarify the application of section 15 of the Act and the duties and responsibilities of an employer thereunder. Counsel seeks to persuade the Board to put a gloss or extension on the Board’s application of section 15 in *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411 (overturned by the Divisional Court on a point of natural justice and presently before the Court of Appeal) and *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577. Counsel relies in part on the different collective bargaining “circumstances”.

2. That both the respondents, as a result of the manner in which they decided to, threatened to, and in fact did discontinue extended tours, threatened, intimidated, coerced, or penalized bargaining unit employees by seeking to have them give up rights under the collective agreement and therefore under the Act, and that the respondents are therefore in breach of sections 66 and 70 of the Act. In this regard counsel submits that "counselling" a breach of the Act may in itself be a breach of the Act. Implicit in this is the submission that the motivation behind the actions of the respondent were improper.
3. That the Hospital went behind the back of the complainant and bargained directly with bargaining-unit employees in violation of sections 64 and 67 of the Act and that the Ontario Hospital Association is in violation of section 64 by reason that it was its counselling that induced the Hospital to commit these unfair labour practices.

The parties spent some one-and-a-half days making their submissions with respect to the preliminary matters and the Board has given them the careful consideration that they deserve. In the result, we find that we cannot give effect to any of the preliminary objections or motions.

First, section 71(1) of the Board's Rules of Procedure entrusts the Board with the discretion to dismiss, without a hearing, a complaint which does not, on its face, make out a *prima facie* case for the remedy requested. In some circumstances, it would be entirely appropriate for the Board to exercise its discretion under that provision where it is obvious that the facts alleged could not support an argument that a violation of the Act has occurred. However, the Board must be cautious in exercising its discretion under section 71(1) and should do so only where a complainant's position is manifestly untenable and where there is nothing in the complaint which could, if established, induce the Board to grant some or all of the relief requested. However, where, as here, the complaint raises subtle questions of fact, law, and labour relations policy, some of which are dependent upon the inferences that may be drawn from circumstances and events that occurred over a period of time, it is not appropriate to dispose of the matter without a full hearing on the merits (see the *International Association of Bridge, Structural and Ornamental Iron Workers*, [1982] OLRB Rep. Feb. 233). In this proceeding, the complainant seeks to persuade the Board to break new ground. The fact that its arguments may be novel and that its case might be difficult cannot stand in the way of its right to have the matter determined on its merits by this Board. We are of the view that it cannot be said that the complaint, as set out in the various documents that constitute the pleadings herein, fails to make out a *prima facie* case against either respondent. Consequently, the motions of both respondents to dismiss this complaint without a hearing are dismissed.

Second, the issue of whether or not this Board should defer to a grievance arbitration of the dispute between the parties arises when such an alternative remedy exists. Since the respondent Ontario Hospital Association is not a party to any collective agreement with the complainant, there is no such alternative available with respect to the complaints made against it. With

respect to the respondent Hospital, any such deferral can by no means be automatic. The Board's practice with respect to the issue of deferral to arbitration has, as its starting point, a policy that the practice and procedure of collective bargaining are to be encouraged and that dual litigation or forum shopping are to be discouraged. However, if the Board is to defer to arbitration, it must be satisfied that the resolution of the contractual issue is "congruent with" the resolution of the complaint that there has been a breach of the Act. That congruence is essential if the Board is to defer to arbitration. Where, the matters in dispute involve a significant elaboration or application of significant provisions of the Act and where the impugned conduct at least arguably constitutes a violation of fundamental rights under the *Labour Relations Act*, and where the complaint raises issues that transcend the interests of the immediate parties, the complaint cannot be characterized as being essentially contractual (see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254 and the *International Association of Bridge, Structural and Ornamental Iron Workers*, *supra*). Consequently, even where the complaint does involve conduct which is either a violation or not a violation of a collective agreement, there may still exist an unfair labour practice that it is appropriate for this Board to deal with. A reduction of work hours, for example, might be a management right unfettered or even authorized by a collective agreement and yet be restricted in some way by the provisions of the *Labour Relations Act* (see *K Mart Canada Limited*, [1983] OLRB Rep. May 649 and *Sunworthy Wallcoverings*, [1986] OLRB Rep. Jan. 164). Nor does section 9(1) of the *Hospital Labour Disputes Arbitration Act* change that in this particular complaint. That statutory provision merely directs a board of arbitration to examine and decide whatever is necessary in order to produce a collective agreement. It specifically precludes such a board of arbitration from dealing with any matters within the jurisdiction of the Ontario Labour Relations Board. This complaint does involve a dispute, and indeed a grievance, with respect to the exercise by the respondent Hospital of a purported right under the collective agreement between it and the complainant. However, it appears clear to us that the action of the Hospital, i.e., the discontinuance of extended tours, whether or not it was authorized by the collective agreement (which issue is to be decided by a board of arbitration) is alleged to have been improper not only because it was in fact done, but also because of the motive alleged to have been behind it and the manner in which it was carried out. The complaint raises serious questions with respect to the application of sections 15, 64, 66, 67 and 70 of the Act, questions which could not be dealt with by a board of arbitration and which indicate that the matters in dispute cannot, in our view, be said to be essentially contractual in nature or that the resolution of the grievance will be congruent with the resolution of the unfair labour practice as alleged. Accordingly, the Board will not defer to arbitration.

Third, on the question of privilege raised by counsel for the respondent Hospital, and considering the tacit, if not express agreement of the parties, we defer our ruling until such time as the matters are raised in evidence at which time they can be properly and more appropriately dealt with.

Fourth, both respondents complain that the complaint lacks particularity and refer to section 72 of the Board's Rules of Procedure. That rule requires a

party alleging improper conduct against another to do so with sufficient particularity to enable the respondent to know what impropriety is being alleged and what case will have to be met or made so as to enable it to properly prepare for the hearing (see, for example, *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141). However, in determining whether particulars are adequate in a specific complaint, the Board does not adopt standards as strict as those of the Courts. The question really becomes one of whether or not the respondents can reasonably understand what it is that is being said against them so as to enable them to prepare to defend themselves. In determining an issue of adequacy, the Board will look to all of the circumstances of the case including the six factors listed in *Racine, Robert and Gauthier*, [1978] OLRB Rep. June 559, which decision has been cited with approval in a number of Board decisions since. There is no requirement that the allegations in a complaint use any particular wording. We are of the view that the allegations in this complaint adequately identify the offences alleged and the conduct complained of and therefore satisfy the requirements of section 72 which requires only a concise statement of material facts upon which the complainant relies and not evidence thereof. The motions of the respondents in this respect are therefore dismissed. However, we do wish to stress that the complainant will be limited in the presentation of its case to the particulars actually pleaded, unless something unforeseen arises and there is a cogent and compelling reason that it should not be so bound.

Fifth, the respondent Ontario Hospital Association submits that some of the allegations against it are untimely and should not be entertained by the Board because of the delay in making them. As the Board stated in *City of Mississauga*, [1982] OLRB Rep. March 420, it does not have any rigid or mechanical practice with respect to the matter of delay in recognition of the fact that it deals with statutory rights. The Ontario Hospital Association does not allege prejudice here and the delay is not substantial. Having in mind the considerations set out in *City of Mississauga*, we are of the view that any delay here is not such as to prompt us to refuse to consider any of the allegations. Furthermore, any delay can be taken into account if and when we arrive at the issue of remedy. This preliminary objection is therefore also dismissed.

Sixth, given our conclusions, we cannot find that the complaint is frivolous and vexatious on its face. That objection is also dismissed.

Finally, we wish to emphasize that we have arrived at our conclusions on the basis of the allegations on the face of the pleadings and the submissions of counsel as those related specifically thereto. We have arrived at no conclusions whatsoever with respect to the merits of the complaint.

The matter will now proceed to be heard by the Board on its merits."

2. On agreement of the parties, the hearing into this complaint will continue in Thunder Bay on December 15, 16 and 17, 1986 and again on January 6, 7, 8, 9, 13, 14 and 15 of 1987 unless otherwise advised.

0746-86-R United Steelworkers of America, Applicant, v. **Grand & Toy Limited**, Respondent, v. Graphic Communications International Union, Local 500-M, Intervener, v. Group of Employees, Objectors

Certification - Membership Evidence - Irregularities in membership evidence disclosed by union in Form 9 declaration - Employer challenging secrecy of union membership evidence - Board reviewing purpose of Form 9 and policy of not allowing employer to inspect membership evidence

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *J. Wilson* and *R. Montague*.

APPEARANCES: *Keith Oleksiuk* and *Brando Paris* for the applicant; *R. C. Fillion*, *R. C. Boulton* and *R. J. Slater* for the respondent; *M. A. Church* and *Robert Rusk* for the intervener; *Peter M. Whalen* and *George Ldos* for the objectors.

DECISION OF THE BOARD; September 4, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Immediately prior to the scheduled hearing of this matter on July 4, 1986, representatives of the parties met with a Labour Relations Officer. The Board customarily assigns an Officer to meet with the parties to a certification application in an attempt to facilitate a resolution of the issues in dispute between them, either in whole or in part. Often all issues are resolved and the parties waive the necessity of a formal hearing. In almost every other case, this process at least reduces the number of issues which remain for the Board to adjudicate. In this instance, the parties were able to come to a partial agreement on the description of the appropriate bargaining unit. The bargaining unit under discussion is as follows:

All employees of the respondent at 33 Greenbelt Drive in the Regional Municipality of Metropolitan Toronto, save and except *assistant supervisors*, persons above the rank of *assistant supervisor*, office, clerical and sales staff, *night drivers*, *building maintenance staff*, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

Clarity Notes:

- (1) Mail room staff, messengers, stock counters and *warehouse clerical staff*, are included in the "office and clerical group" and are therefore excluded from the unit.
- (2) Persons currently classified as dispatcher and shipper, and any persons who in the future have similar duties and responsibilities including supervisor responsibility shall be deemed to be supervisors and so are excluded from the bargaining unit.

The emphasized positions are in dispute between the parties. In each case, the applicant asserts that employees in those positions should be included in the bargaining unit while the respondent takes the contrary view. In each case there is an issue as to whether or not the employees in those

positions share a community of interest with those employees whom the parties agree ought to be included in the bargaining unit. In addition, the respondent asserts that assistant supervisors, of which there is presently one, exercise managerial functions and are therefore to be excluded from the bargaining unit pursuant to section 1(3)(b) of the Act. There are 21 persons employed in the positions that are in dispute.

4. In view of the matters in dispute between the parties, the Board hereby appoints a Labour Relations Officer to enquire into and report to the Board on the status, duties and responsibilities of Alex Jardim, classified by the respondent as an assistant supervisor; and with respect to the community of interest, if any, between (i) S. A. Carroll, Peter Cherry, Raphael Gomez, Doug MacQuarrie, M. Rawji, all of whom are classified by the respondent as night drivers; (ii) R. A. Gardner, B. A. Jivraj, P. E. Kasala, C. C. Luong, C. Mercure, K. E. Ogden, S. Raykha, G. Theocharis, M. M. Yung, all of whom are classified by the respondent as building maintenance staff; and (iii) G. A. Lolos, B. C. Connaughton, B. C. Coluns, R. Jaigobin, S. Scattarelli and T. Shields, all of whom are classified by the respondent as warehouse clerical; and the other employees in the bargaining unit as aforesaid.

5. The respondent employer filed a list of employees in the bargaining unit described by the applicant in the application which contains a total of 132 names. Because of the difference in the bargaining unit described in the application and that which is set out above, the 21 employees whose inclusion in the bargaining unit is presently in dispute were not included in the employer's list. Including them increases the list number to 153. By June 25, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) to be the time for ascertaining membership in or opposition to the trade union, the applicant had filed 93 combination applications for membership and receipts, 87 of which cards bore signatures which coincided with names on the employer's list. Once the 21 employees whose status is in issue are included, the applicant has 91 cards. A question arose with respect to reliability of the union's membership evidence. This issue arises out of the filing by the applicant of the requisite Form 9 Declaration Concerning Membership Evidence duly executed by one Michael Gottheil, a student-at-law employed in the applicant's Legal Department. This document attests to the authenticity of the membership evidence filed and, in an appendix attached thereto, sets out certain discrepancies in the cards. (We will return to this issue and the Form 9 below.)

6. In addition, four statements of desire (otherwise known as petitions) were filed with the Board on or before the terminal date. In all, these contain the signatures of 21 persons, two of whom had also signed applications for membership in the trade union. Finally, the applicant filed six "counter-petitions", signed by 31 employees and reaffirming support for the applicant and repudiating any signature on a petition, by the terminal date. Of the 31 signatures on these counter-petitions, none overlapped with the signatures shown on the petitions.

7. Setting aside the issues relating to the Form 9, a number of things are readily apparent. First, the applicant has, on the basis of the documentary evidence, membership support representing between 59.5 and 66 per cent of employees in the bargaining unit (depending upon the disposition of the dispute regarding the bargaining unit), which is significantly above the 55 per cent required by section 7(2) of the Act for certification without a representation vote. Second, because of the very limited overlap between the employees signing membership cards, and those signing in opposition to the application, the petitions, even if proved voluntary, would not prompt the Board to exercise its discretion to direct that there be a representation vote. Consequently, for purposes of the Board's considerations the petitions are not relevant (see *Unlimited Textures Company Limited* [1984] OLRB Rep. Jan. 138 at paras 15-17). Similarly, the counter-petitions are not relevant either. In the result, the applicant would normally be in a position such that an interim certifi-

cate would issue pursuant to section 6(2) of the Act, pending final resolution of the composition of the bargaining unit.

8. This then returns us to the Form 9 filed in this matter. The contents of this document were not disclosed to the other parties until late in the afternoon on the day of the hearing. The third paragraph of the Form 9 filed reads as follows:

3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, except in the following instances:

SEE APPENDIX "A".

In turn, the attached Appendix "A" reads as follows:

APPENDIX "A"

1. With respect to the cards of:

(3 names)

in each case the applicant for membership signed his card on May 28, 1986. However, in each case the applicant gave his card and paid \$1 directly to the respective collector on May 29, 1986 as indicated by the collector.

2. With respect to the card of (name), the applicant for membership signed his card on June 9, 1986. However, he gave his card to the collector, and paid the \$1 directly to the collector on June 10, 1986 as indicated by the collector.

3. With respect to the cards of:

(four names)

in each case the collector initially indicated an incorrect date as the date the dollars were collected. In each case the collector corrected these errors and initialled [sic] the change.

4. With respect to the cards of (name) and (name), in each case the applicants for membership signed in the space reserved for the collector. In each case the collector struck out the applicant's signature and signed as collector below.
5. With respect to the card of (name), the applicant signed in the space reserved for the collector. The collector struck out the applicant's signature and signed below. In addition, the collector initially indicated the incorrect date he collected the \$1. The collector corrected the error and initialled the correction.

9. Upon seeing the Form 9 (absent the names appearing in the one actually filed), the respondent sought an adjournment of the hearing in order to consider its position with respect to the discrepancies revealed on the face of the document and, if it saw fit to do so, to make written representations with respect thereto. In view of the circumstances, and there being no cogent reasons suggested as to why the request ought not be granted, the Board gave the respondent until noon on July 9, 1986 (which amount of time was agreeable to it) to deliver any written submissions it saw fit

to make. The applicant was to have the right to respond, also in writing. We note that the intervenor, the objectors, and their respective counsel, had departed prior to the Board hearing from the applicant and the respondent on this issue.

10. There was no further communication from the intervenor. Nothing was heard from the objectors until the Board received a letter dated August 11, 1986 from their counsel in which he makes no representations other than to state as follows:

Should the Board consider representations regarding the issues raised in the Company's letter to the Board dated July 9, 1986 or schedule a hearing regarding same, would you kindly advise your writer.

The group of objecting employees request the right to participate should the Board inquire further into the matter.

We note that the Form 6 Notice to Employees of Application for Certification and of Hearing that was posted by the respondent as directed by the Board states, at paragraph 11, that:

If you do not attend at the hearing, the Board may proceed in your absence and you will not be entitled to any further notice in the proceedings.

Notwithstanding that, the disclosure to the objectors and their counsel of the contents of the Form 9, and the knowledge of the respondent's intention to seek an adjournment of the proceedings for purposes as aforesaid, they took no position on the issue, gave no indication of any desire to make any representations of any kind, and, as we have already noted, voluntarily left the hearing prior to the Board hearing from the parties on the issue of the adjournment. In addition, the Board sent copies of the written submissions of the respondent and applicant to both the individual representatives of the objectors and their counsel immediately upon the receipt thereof. In the first paragraph of his letter of July 9, 1986 counsel for the respondent states:

At the hearing of this matter on July 4th, 1986, *the Board granted the Respondent leave to file written representations* concerning the irregularities in the membership evidence disclosed by the Union on Appendix "A" of its Form 9 Declaration. Our submissions are as follows.

[emphasis added]

The objectors must have been aware that the Board was, to use the words of their counsel "consider(ing) representations" with respect to the Form 9. We are of the view that the objectors chose to absent themselves from the proceedings. They have nevertheless had adequate notice of the submissions of the parties and have had ample opportunity to make representations with respect to the matters in issue. They have failed to do so in a timely manner or at all. Under the circumstances we are not prepared to consider any request by the objectors for a further opportunity to make representations and thereby delay the matter, to the possible prejudice of the applicant, further.

11. The Board received a six-page submission dated July 9, 1986 from counsel for the respondent, a three-page statement of the applicant's position by letter dated July 16, 1986, and a three-page reply dated July 24, 1986, again from the respondent. The employer's position is summarized at pages 5 to 6 of its July 9, 1986 letter as follows:

1. The Board should review its policy of not allowing the respondent to inspect the membership evidence and allow the Respondent to properly inspect the membership evidence in this case.
2. Failing the Respondent's opportunity to review the membership evidence, the Board

should disregard any membership cards which contains irregularities declare them unreliable and order a representative vote.

3. In the alternative and at the very least, the Board should schedule a hearing to inquiry [sic] into the circumstances surrounding the irregularities and discrepancies which have been disclosed.

12. In response, the applicant submits that the discrepancies set out as “exceptions” in Appendix “A” to the Form 9 are really in the nature of clarifications and that they in no way cloud or bring into question the quality of the documentary evidence filed. The union submits that the respondent’s requests should be dismissed without a hearing and that a certificate should issue. In the respondent’s reply, counsel states that the applicant’s representations are factual in nature and submits that, at the very least, the applicant should be required to call evidence at a hearing before the Board with respect thereto and so provide the employer an opportunity to cross-examine on the matters in issue. The employer reiterates its request that it be permitted to inspect all the membership evidence filed.

13. Pursuant to the provisions of the *Labour Relations Act*, the certification of trade unions in this province is based primarily upon an assessment of the trade union’s membership support as evidenced by membership records filed in support of an application. The Board does not enquire into opinions about the virtues of union representation except as evidenced by the documentary membership evidence and any timely petitions filed in opposition to the application. The representation vote exists as a mechanism for ascertaining the wishes of the bargaining unit employees in cases where either the applicant union does not have the requisite support of fifty-five per cent of the bargaining unit employees which is necessary for outright certification under section 7(2) of the Act or the circumstances are such that the Board sees fit to exercise its discretion to require such a vote to be held notwithstanding that there is documentary evidence showing membership support in excess of fifty-five per cent. In certification proceedings the Board places heavy reliance upon the membership evidence filed by the union. Because of the consequences of the reliance that the Board places on what is a form of hearsay evidence which is not disclosed to the employer and is not subject to cross-examination, the Board requires a high standard of integrity in the nature and quality of the membership evidence filed. It is for an applicant trade union to satisfy the Board that every membership card upon which it relies was signed by the employee on whose behalf it is tendered and that each employee has paid the initiation fee that accompanies it. It is for this purpose that the Board requires (pursuant to Rule 6) a Form 9 declaration concerning membership documents to be filed in every application for certification.

14. The Form 9 declaration is so important that if one is not filed, the Board will give no weight to the union’s membership evidence (see for example *Pietrangelo Masonry* [1981] OLRB Rep. Feb. 218). If a Form 9 is filed but it is subsequently revealed either that no inquiry was in fact made by the declarant, or that the declarant failed to indicate in it discrepancies in the membership evidence of which he was aware, the Board may dismiss the application on the basis that no weight can be given to the declaration (see *Bond Place Hotel* [1983] OLRB Rep. Feb. 202). Where there are irregularities or discrepancies noted in the Form 9, the Board’s practice is to concern itself with the acceptability of only the cards to which these apply. In addition, where a party has information that the union or anyone on its behalf has either attempted to perpetrate a fraud on the Board with respect to the membership evidence, or have otherwise acted improperly, that party can make those allegations and again the appropriate enquiry can be conducted.

15. It is this process, and particularly the secrecy of the union membership records, which has been in effect for over thirty years, which the respondent now challenges.

16. The practice of not allowing a respondent employer to inspect membership evidence filed in support of an application for certification is more than a policy of the Board. Section 111(1) of the Act provides that:

The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

17. Approximately 35 years ago, the Courts had occasion to review the Board's practice relating to the secrecy of a union's membership evidence in applications for certification and the right to cross-examine with respect thereto. The issue came before the Courts in *Re Ontario Labour Relations Board; Re Toronto Newspaper Guild, Local 87 and American Newspaper Guild (CIO) and Globe Printing Co.*, [1951] 3 D.L.R. 162 (High Ct.); aff'd at [1952] 2 D.L.R. 302 (C.A.)' aff'd at [1953] 2 S.C.R. 18 (S.C.C.) and arose out of a decision of the Board made pursuant to the provisions of the *Labour Relations Act, 1948*. In the course of those proceedings before the Board, the respondent employer submitted that while it recognized that the Board's practice precluded it from directly examining the union's membership evidence, it had a right to cross-examine the deponent of the affidavit filed by the union to confirm the membership evidence. In support of its position, the employer asserted that it had information that the documentary evidence filed by the union in support of its application was not representative of the support that it in fact enjoyed at the date of the hearing. The Board rejected this submission, refused to enquire further into the membership evidence filed, and issued a certificate. At that time, the legislation did not contain any provision equivalent to what is now section 111(1) of the Act. The employer then applied to the High Court, by way of *certiorari*, to quash the certificate. In quashing the certificate, Gale J., agreed that the employer had been denied natural justice. For reasons expanded upon later in his decision, Gale J. stated (at p. 178 of the report) as follows:

It is my view that the Company did not receive a proper hearing in this instance in that it was not allowed to see the documents filed by the Union or to cross-examine the person who made a statement as to their effect and thus it was denied a reasonable opportunity of meeting the case which was made against it.

The Court of Appeal and the Supreme Court of Canada upheld this decision for essentially the same reasons. As a result, it became necessary to give the employer access to the union's membership records or to allow the employer an opportunity to cross-examine with respect thereto. It was at this time that the Legislature enacted what has become, with only very minor changes in the wording, what is now section 111(1) of the Act.

18. It is abundantly clear that this provision was inserted into the legislation in response to the judicial pronouncements in the *Globe Printing Co* decisions, so that, whatever may be required at common law, the respondent employer in an application for certification has no "right" to review the trade union's membership evidence, or to cross-examine with respect thereto. The secrecy of the membership records and evidence is therefore enshrined in the *Labour Relations Act*. The legislation does entrust the Board with the discretion to disclose such records, but given the primacy of the secrecy of such evidence, that discretion must be exercised only for compelling reasons in circumstances where such disclosure would further the purposes of the Act.

19. The respondent in this case has not alleged that it has any evidence upon which it relies in support of the assertion that it ought to be permitted to review the membership evidence filed in this application other than what appears on the face of the Form 9 declaration. As reasons, it sug-

gests; first, that the provisions of the *Labour Relations Act* are such that to identify an employee as a supporter of a trade union in effect provides a benefit to that person by reason that such a person would then be afforded greater protection under the Act than an employee whose sentiments are unknown; and second, the respondent submits that to refuse it access to the membership evidence would amount to failure to treat it fairly, a denial of natural justice, and a breach of section 10(c) of the *Statutory Powers Procedure Act*.

20. The Board is the master of its own procedure subject only to the requirements of the legislation, fairness, and natural justice. Section 103 of the Act sets out powers of the Board that are relevant to the issues raised by the respondent with respect to the Form 9 declaration. It provides as follows:

103.-(1) The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

...

- (c) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not;

...

- (j) to determine the form in which and the time as of which evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be presented to the Board on an application for certification or for a declaration terminating bargaining rights, and to refuse to accept any evidence of membership or objection or signification that is not presented in the form and as of the time so determined.

21. It is no easy task to determine a dividing line between natural justice and the duty of fairness. Insofar as both have the same goal perhaps it is unnecessary to do so. It does appear that the duty to act fairly is a less precise and more flexible concept than natural justice. In addition, it seems that fairness involves something less than the procedural protections of the rules of natural justice. In any case, neither fairness nor natural justice is made up of rigid norms with an unchanging content. What is required to satisfy them will depend upon the context of the particular case, including any applicable statutory proscriptions (see DeSmith, *Judicial Review of Administrative Action*, 4th ed. 1980 pages 156-277; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.). In general, it can be said that both concepts require that a tribunal subject to them provide the parties to a proceeding before it with an adequate opportunity to be heard and to present their case. In addition, they oblige the tribunal to reach a decision untainted by bias. It is readily apparent both from the literature and the case law that neither the duty to act fairly nor the rules of natural justice necessarily entitle a party to either an oral hearing or to cross-examination.

22. We find the respondent's submission that there is a significant risk of unreliable membership evidence being accepted by the Board in the absence of an opportunity for the respondent

to scrutinize that evidence to be without merit. It is true that the Board erred in issuing a certificate in *Bay-Tower Homes* (Board File No. 3123-85-R). It is regrettable that that error, since corrected upon reconsideration, was made. However, such errors are extremely rare as a result of the careful scrutiny which is given to membership evidence filed with the Board. We are of the view that the Board's method of dealing with membership evidence is a reliable one. Nor do we see any merit in the respondent's suggestion that employees who sign union membership cards no longer require the protection of anonymity. It is true that the *Labour Relations Act* provides such employees with certain protections. Of course, the Act provides protections to all persons to whom it applies whether they be in favour of, neutral to, or opposed to union representation. And while these protections are both important and necessary (as evidenced by the number of unfair labour practice complaints that come before and are sustained by this Board) the respondent misses the point. The object of certification proceedings before the Board is to ascertain the true wishes of the bargaining unit employees with respect to trade union representation. The Board's experience has been that secrecy with respect to trade union membership is essential if the true wishes of employees are in fact to be ascertained. The lack of anonymity tends to have a significant chilling effect upon both legitimate activities of trade unions and the exercise by employees of their rights under the Act, whether or not unfair labour practices are perpetrated by unscrupulous employers (and we do not suggest that this respondent is such an employer). Finally, we must have regard to section 111(1) of the Act. The Legislature has directed that records that may disclose whether a person is/is not a member of a union or does/does not desire representation by a union shall not be disclosed except with leave of the Board. This can only mean that such records, which include the membership evidence filed in support of an application for certification, are not to be revealed except in exceptional circumstances where the Board finds that there are compelling reasons to do so. Consequently, to accede to the respondent's request would be to, in effect, amend the Act. To refuse the respondent's request is to apply and give effect to the Act. It is the latter which we are bound to do. In the result, we find that, as a general matter, there is neither a breach of any duty of fairness nor any denial of natural justice to maintain the secrecy of union membership evidence.

23. Nor do we find it appropriate to open the membership evidence filed by the union in this particular application to the scrutiny of the respondent employer. The facts relevant to the Board's considerations in this respect are found in the Form 9. It is instructive to examine these more closely. Are the matters referred to in Appendix "A" true "irregularities" in the sense that they should cause the Board to question the applicant's membership evidence? As the respondent points out, there are two kinds of discrepancies noted as "exceptions" in the Form 9 filed in this proceeding. The first affects nine cards and reveals that in each case the application for membership was executed on one day and the one dollar fee was collected and receipted the next. This fact situation is unlike that in any of the cases cited by the respondent in support of its submission that this makes the applicant's membership evidence unreliable in whole or in part.

24. In *Watson Manufacturing Company of Paris Limited*, [1967] OLRB Rep. Dec. 862 at paragraph 12 (page 864) the Board stated as follows:

The practice of signing cards in the manner followed in the case of Mrs. Spence is obviously a dangerous practice and is open to abuse and error. A union representative who engages in such practice runs a great risk. In a prolonged campaign involving a large number of people, the memory of the collector is not always reliable for the purpose of completing Form 8 (now Form 9) or for the purpose of testifying concerning the circumstances in which a card was signed and the initiation fee paid. Where a collector engages in the practice of signing and dating membership cards without collecting money at the time of signing, he runs the risk of having his practice challenged. Since his memory is not infallible, the dangerous practice is very suspect and his declaration concerning membership documents is unreliable unless full disclosure of all facts is made.

In that case, however, the respondent employer had alleged a “non-pay”; that is, that an employee said by the applicant union in the documentary evidence submitted, to have both signed a membership application and paid the initiation fee, had not in fact done so. The card in question purported to show that the employee had both signed this membership application and paid the fee on the same day. The union’s *viva voce* evidence, at the hearing convened to enquire into the non-pay allegation was that the fee had been collected, not at the time of signing, but approximately one week later, even though this was not disclosed in the declaration concerning membership evidence that had been filed. In fact, as found by the Board, the fee had *never* been paid. It was this and the fact that the same thing had occurred with respect to other cards filed by that applicant that caused the Board in that case to dismiss the application for certification to which that membership evidence related. (There were applications by two unions in that case.) In addition, at paragraph 14 (page 864) of its decision in the *Watson* case, the Board said:

Lest we be misunderstood, we wish to point out that if we had found that Mrs. Spence had subsequently paid one dollar after March 3, 1967, the fact that the receipt is dated March 3, 1967 would not have itself been necessarily fatal to the application. *Since such facts should only be disclosed in Form 8 (now Form 9) their non-disclosure cast doubt upon the reliability of other evidence of the union concerning challenged cards. In this case we have the additional discrepancies appearing in Mr. Dallorto's evidence which contributed greatly to the final result.*

[emphasis added]

This suggests not only that such discrepancies should be noted in the Form 9, but that the “dangerous practice” referred to does not necessarily go to the heart of the membership evidence. Furthermore, the “dangerous practice” disapproved of by the Board is not the signing of cards on one day and collecting the fee on another, but rather refers to the completion of the card, that is, the application *and* the receipt, at the same time but without collection of the requisite fee at the time of signing.

25. Similarly, *Olympia and York Developments Limited* [1977] OLRB Rep. Dec. 852 also involved a non-pay allegation by the respondent employer. Just as in *Watson*, both the application and receipt were signed and dated the same day, notwithstanding that the fee was not in fact paid at the time. Again, the collector testified that he had collected the fee some time later and again the Board found, on the evidence before it, that he had not collected payment at all. In dismissing the application as a result of this, the Board cited paragraph 12 of the *Watson* decision that is set out above. Again, the practice so strongly disapproved of by the Board (in addition to the non-pay itself) was the signing and dating of both the application and receipt without payment being made at the same time. Further, in both *Watson* and *Olympia and York*, the reason for the Board’s concern was that the membership evidence filed by the applicant union did not reflect what had in fact occurred and it is that which rendered the membership evidence unreliable.

26. In *Walbar of Canada Inc.*, [1982] OLRB Rep. Nov. 1734, the Form 9 filed disclosed that the receipt portion of an application for membership had been signed by both the member and the collector two weeks prior to the money being paid. In that case the circumstances were such that the Board concluded that no material purpose would be served by enquiring further into the matter but it did note that that kind of irregularity did not go to the heart of the membership evidence and would at most affect the cards signed by that particular collector. The real point, however, is that, once again, the practice that draws the criticism of the Board is the failure to collect the requisite payment at the same time as the card is signed and dated by the collector.

27. The applicant in this case is not guilty of indulging in the practice criticised by this Board in *Watson*, *Olympia and York*, *Walbar*, or any other decision. Indeed, the applicant by having the employee applying for membership the actual date that he signed and then dating the

receipt portion on the actual date of collection and payment has followed the procedure contemplated in the Board's earlier decisions. The Board finds nothing improper in the actions of the applicant.

28. The second category of discrepancy identified by the respondent affects three cards and relates to a situation where an applicant for membership has mistakenly signed in the space reserved for the collector, as well as in the places where he was to sign. Rather than completing another card in its entirety, the collector struck out the signature that appeared in the wrong place and signed below it. We do not wonder why the respondent was unable to find any decision of the Board dealing with this kind of situation in support of its suggestion that this is unacceptable. Not only is there nothing improper in this procedure, but it seems to us to be a sensible and practical manner in which to proceed.

29. In addition, we note that in *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board refused to permit the employer to cross-examine a witness called to the witness stand by the union with respect to the Form 9 (then Form 8) declaration. In that case, unlike the situation here, the employer had alleged that the membership evidence filed in support of the application for certification had been obtained improperly and called evidence in support of its charges. At paragraph 30 (page 1051) of its decision, the Board stated as follows:

30. The Board accepts the Form 8 (now Form 9) attestation on its face unless allegations are made which, if proven, would cause the Board to find that the statements attested to therein are false. Is such an allegation is made the Board will conduct an inquiry into the bona fides of the Form 8. Counsel for the company relies on evidence given before the Board which he maintains establishes that Mrs. Lamb accepted cards between April 17 and April 24, 1978, thanked the person submitting the cards, said nothing further and mingled these cards with other cards such that she could not identify the individual cards submitted to her at the time. Even if these alleged facts were to be proven in the course of a Form 8 inquiry, they would not of themselves support a finding that the Form 8 filed in this matter constitutes a false declaration. A Form 8 is not defective merely because inquiries were not made of the collector(s) at the time cards are submitted and neither is it defective if the inquiry is not on a card by card basis. It is sufficient that each collector be asked at a time prior to the signing of the Form 8, whether or not he received one dollar or other suitable payment from each of those he signed into membership and on whose behalf he submitted membership cards. There is no allegation that any of the persons who signed membership documents did not in fact sign them or pay the required membership fee. All of these documents were properly witnessed and countersigned and there is no evidence before us of any irregularity or impropriety which would cast doubt on the membership documents themselves. There is no allegation before the Board that the necessary inquiries were not made by Mrs. Lamb and relayed to Mr. Ingle (the Form 8 declarant) or that they were not made by Mr. Ingle himself prior to the signing of the Form 8. In the result, the Board does not have before it allegations which, if proven, would support a finding that the Form 8 declaration filed in this matter constituted a false declaration. Accordingly, the Board must decline to undertake a formal inquiry in respect of the accuracy of the Form 8 declaration.

In dismissing an application for judicial review of the Board's decision, the Divisional Court held that the refusal of the right of cross-examination was not a denial of natural justice (*Re Tandy Electronics Ltd. and United Steelworkers of America et al.*, (1979) 26 O.R., (2d) 68).

30. In each instance in this case, the documentary evidence shows that the employee signed an application for membership in the union and made the required payment. There is no suggestion that any employee purported to have signed and paid and failed to do either of these things. Nor are we persuaded that any of the "exceptions" noted in the applicant's Form 9 declaration casts any doubt upon the reliability of the membership evidence filed. In our view, the corrected cards constitute acceptable evidence of membership. In addition, the manner in which the applicant dealt with them causes us not to be concerned with the propriety of the remaining cards.

Indeed, the disclosures by the union tend to reinforce the declaration made. There is nothing before the Board which would cause us to conduct any further inquiry into or behind the Form 9. We note that in the course of his submissions, counsel for the respondent stated that the union "should not be given a medal" for revealing these discrepancies. The Board does not award medals but perhaps the applicant should be commended for being so scrupulous in the preparation of its Form 9 declaration.

31. It is noteworthy that the respondent has made no express allegations of impropriety with respect to the payment of the initiation fee, the validity of the signatures on the membership cards, or the truth of the Form 9 declaration. Nor has there been any allegation, express or implied, that the membership evidence was obtained through coercion or intimidation. There has been ample opportunity to raise any such matters. In addition, as we have already found, the discrepancies noted in the Form 9 casts no cloud over the membership evidence. Why then does the respondent seek an oral hearing and cross-examination? The only purpose of such an exercise can be to permit the respondent to troll the waters in an attempt to land "a big one" or to delay the matter. Neither the duty of fairness nor the rules of natural justice contemplate such fishing expeditions. In this case there is no reason whatsoever to conduct any further hearing or other enquiry into the matter.

32. The respondent requested and was given the opportunity to make written submissions. This was a sensible way to proceed and in making its submissions, it has had a full opportunity to state and argue its case.

There is not even a hint that it has anything further to say on the matter which, in combination with the Board's conclusions with respect to the effect of the discrepancies, brings us to a point where it is clear that no useful purpose would be served by holding any further oral hearing.

33. We note that the situation here is much different from that in *Baltimore Aircoil International Corporation v. Ontario Labour Relations Board and United Steelworkers of America*, (1981) CLLC 14,130 where the Divisional Court held that the Board erred in refusing to hear evidence that a party wished to adduce. There is no suggestion here that the respondent has any evidence that it wishes to place before the Board. Nor, in the circumstances of this case, do fairness, natural justice, per section 10(c) of the *Statutory Powers Procedure Act* give the respondent any right to require witnesses to be called for the purposes of cross-examination (with respect to section 10(c) of the *Statutory Powers Procedure Act*, see *Re Ellis and Ministry of Community and Social Services*, (1980) 28 O. R. (2d) 385 Div. Ct.).

34. In the result and having considered the documentary evidence filed, the Form 9 Declaration, and the representations of the parties, the requests of the respondent are dismissed. In view of the fact that the ultimate determination of the matters in dispute with respect to the bargaining unit cannot materially affect the Board's determination in this regard, we are satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time that the application was made, were members of the applicant on June 25, 1986, the terminal date fixed for the application and the date which the Board determines under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

35. Accordingly, the Board pursuant to its discretion under section 6(2) of the Act and pending the final resolution of the composition of the bargaining unit, hereby certifies the applicant as bargaining agent for all employees of the respondent at the 33 Greenbelt Drive in the Regional Municipality of Metropolitan Toronto, save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical and sales staff, night drivers, building main-

tenance staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

CLARITY NOTES:

- (1) Mail room staff, messengers, stock counters and warehouse clerical staff, are included in the "office and clerical group" and are therefore excluded from the unit, and
 - (2) persons currently classified as dispatcher and shipper, and any persons who in the future have similar duties and responsibilities including supervisory responsibilities shall be deemed to be supervisors and so are excluded from the bargaining unit.
36. A formal certificate must await the final determination of the bargaining unit.
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3101-85-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink Workers, Applicant, v. **Kitchener Beverages Limited**, Respondent, v. Group of Employees, Objectors

Reconsideration - Representation Vote - Union waiting until ballots counted before raising allegation of employer misconduct - Discussion of circumstances when Board will entertain untimely objection to representation vote - Applicant unable to show cause why Board should reconsider its decision to dismiss certification application

BEFORE: *Ken Petryshen*, Vice-Chairman, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *E. G. Posen*, *Bob Hill* and *Paul Poirier* for the applicant; *R. A. Werry* and *Brian Tisdale* for the respondent; no one appearing for the group of employees.

DECISION OF THE BOARD; September 19, 1986

1. By letter dated June 11, 1986, counsel for the applicant requested the Board to reconsider its decision dated June 4, 1986 wherein the Board (differently constituted) dismissed his clients' application for certification after a representation vote. In a notice dated July 11, 1986, the Board advised the parties that a hearing would be held on August 2, 1986 for the purpose of giving the applicant the opportunity to show cause as to why the Board should reconsider its decision of June 4th. At the hearing on August 2nd, the Board entertained the statements of fact and submissions from the parties. The factual context as set out below represents the applicant's best case.

2. On March 18, 1986, the union filed with the Board an application for certification for a unit of the respondent's employees. In a decision dated April 23, 1986, the Board (differently constituted) directed the taking of a representation vote, appointed a Labour Relations Officer to inquire into the duties, responsibilities and community of interest of certain employees in dispute and directed the ballot box be sealed pending a further direction by the Board. The vote was held

on April 30th and, on agreement of the parties, the vote was counted on May 14th. Of the sixty ballots counted, the union obtained eleven votes.

3. After the vote was held, the Board distributed to the parties a Notice of Report of Returning Officer (Form 70) dated April 30, 1986 which notified the parties that any representations they wished to make concerning any matter relating to the representation vote shall be received by the Board or sent by registered mail no later than May 8, 1986. Parties are advised in the Notice that if no statement of desire to make representations is sent to the Board in accordance with the requirements set out in the Notice, the Board may dispose of the application upon the material before it without further notice to the parties or the employees. Subsequent to the counting of the ballots, the Board distributed to the parties a Notice of Report of Returning Officer on Counting of the Ballots (Form 73) dated May 14, 1986 which notified the parties that if they intended to make representations as to the accuracy of the report or as to the conclusions the Board should reach in view of the report, a statement shall be sent to the Board so that it is received or sent by registered mail no later than May 22, 1986.

4. In its decision dated June 4th dismissing the union's application, the Board notes that "no statement of objections and desire to make representations has been filed with the Board within the time fixed in accordance with subsection 1 of section 70 of the Board's Rules of Procedure following the taking of the representation vote pursuant to the Board's direction of April 23, 1986." The relevant provisions of section 70 of the Board's Rules of Procedure are as follows:

70.-(1) Subject to subsection (3), where a representation vote is taken after the hearing of an application,

- (a) a party; or
- (b) any employee or representative of a group of employees,

who desires to make representations as to any matter relating to the representation vote, or as to the accuracy of the report of the returning officer, or as to the conclusions the Board should reach in view of the report, shall file a statement of desire as prescribed in Form 70 or 72, as the case may be, on or before the last day for the posting of the copies of the report and notices under subsection 69(3).

...

(3) Where a representation vote is taken in connection with a direction that the ballot box be sealed and the Board subsequently directs that the ballots be counted,

- (a) a party; or
- (b) any employee or representative of a group of employees,

who desires to make representations as to the accuracy of the report of the returning officer on the counting of the ballots or the conclusions the Board should reach in view of the report, shall file a statement of desire as prescribed in Form 73, on or before the last day for the posting of the copies of the report and notices under subsection 69(3).

...

(5) Where no statement of desire to make representations has been filed in the form and manner required by this section, or no such statement that has been filed states that a party, employee or representative of a group of employees desires a hearing before the Board, the Board may dispose of the application upon the material then before it without further notice to any party or to the employees.

5. On May 7, 1986, approximately a week after the vote was conducted, Mr. Hill and Mr. Power, two experienced representatives of the applicant, became aware of the fact that the employer distributed a letter to the employees the day before the vote. In support of its reconsideration request, the union intends to rely on the distribution of this letter and its contents. Immediately after the ballots were counted on May 14th, Mr. Hill advised a representative of the employer that the union would be taking issue with the letter and would file a complaint with the Board. Under covering letter dated May 14th, the solicitor for the applicant sent to the Board a section 89 complaint which alleges that the distribution and the contents of the letter referred to above constitute a violation of section 64 of the Act. Part of the relief requested in the complaint is "a declaration that the complainant is entitled to represent the employees in the bargaining unit of the respondent as bargaining agent notwithstanding the results of any representation vote." The section 89 complaint was sent to the Board by regular mail on May 15th and was received by the Board on June 5th. In other words, the section 89 complaint, which is still pending, was filed with the Board the day after the Board dismissed the union's application for certification.

6. In arguing there was cause for the Board to reconsider its decision of June 4th, counsel for the union emphasized that representatives of the union only became aware of the letter on May 7th. Since at that time the ballot box was sealed, counsel indicated it made sense for the union to wait and find out the outcome of the vote before raising an allegation of misconduct needlessly. Immediately upon discovering the results of the vote, the union sent to the Board the section 89 complaint placing in issue the validity of the representation vote.

7. When confronted with situations where a party has filed an untimely objection relating to a representation vote, the Board has attempted to balance the need for expedition with the need for flexibility. If the Board's procedures are to remain expeditious, the Board must be able to rely on its own deadlines and parties must be encouraged to comply with time limits set out in the Forms and Rules. On the other hand, the Board does not take an unduly technical view of its procedures and recognizes that these procedures are designed to enable non-lawyers to function before the Board. In developing a test which balances these values, the Board examines the reasons for procedural non-compliance as opposed to the prejudice to the other party caused by the non-compliance. (See, *H.D. Lee Company of Canada Limited*, [1975] OLRB Rep. Jan. 55). In *Pure Spring (Canada) Ltd.*, [1964] OLRB Rep. Dec. 476 the Board made the following comments in this regard:

Even though a party has failed to file its objections to a representation vote by the date fixed by the Board in Form 49, (now Form 70) the Board has entertained such objections when that party has been able to satisfy the Board that, even with the exercise of reasonable diligence, alleged improprieties in the conduct of another party to the vote only came to the objector's knowledge after the expiration of the time for making objections. In the instant case, however, no evidence was adduced to show that the respondent exercised diligence in making inquiries as to the conduct of the applicant or to explain why nearly a month elapsed between the date of the happening of the alleged offence and the filing of the charges, despite the fact that counsel for the respondent stated that the respondent knew of the alleged meeting shortly after it occurred and admitted that the respondent was suspicious as to the purpose of the meeting. In the absence of such evidence there is no basis upon which the Board, in the exercise of its discretion, could, at this time, entertain the charges made by the respondent.

In commenting on the test articulated in *Pure Spring (Canada) Ltd.*, *supra*, the Board in *H. D. Lee Company of Canada Limited*, *supra*, wrote:

Put another way, in cases of this kind dealing with a fundamental procedure of the Board, the Board must give paramount consideration to the speed and certainty of its procedures. Prejudice to another party is not a test that can accomplish this. Such a test does not provide a bright line for the channelling of documents and prejudice may have little or no relation to administra-

tive expedition. Thus the test in this area emphasizes the reasonable diligence of the party asking the Board to amend the time limits ...

8. The Board's prior decisions make it clear that the Board will entertain untimely objections to a representation vote only when a party satisfies the Board that, even with the exercise of reasonable diligence, alleged misconduct only came to its knowledge after the expiration of the time for making objections. It is implicit in this test that the Board will not entertain untimely objections to a representation vote when the objecting party was aware of the alleged misconduct prior to the expiration of the time for making objections unless there are exceptional circumstances.

9. In the instant case, the alleged misconduct upon which the applicant intends to rely is a letter circulated by the respondent prior to the representation vote. The wording of Form 70 refers to objections with respect to the conduct of a representation vote and clearly encompasses the type of objection the applicant has made. The time for making any objection to the representation vote was May 8th. The representatives of the applicant became aware of the letter on May 7th. In the circumstances before us, then, the applicant had knowledge of the alleged misconduct prior to the expiry of the time for making objections and should have made its objection no later than May 8th.

10. The date for filing objections set out on Form 73 was May 22, 1986. Form 73 is concerned essentially with objections relating to the counting of the ballots. As indicated previously, the applicant's objection concerns the vote itself and does not relate to the count. But even if the operative date for our purposes was May 22, 1986, the objection sent by the applicant on May 15, 1986 was untimely since it was not filed with the Board until June 5, 1986.

11. It was not appropriate for the union to wait until it had the results of the vote before attempting to file a statement of objection. Once it becomes aware of alleged misconduct, it is incumbent upon a party to notify the Board as soon as possible. (See, *Chateau Gardens (London) Inc.*, [1977] OLRB Rep. Jan. 12). In our view, there are no exceptional circumstances which would lead us to accept the applicant's position in a situation where it was aware of the alleged misconduct at a time when it could have filed a timely objection but failed to do so.

12. Having regard to the late filing and all of the circumstances, the Board is satisfied that the applicant has been unable to show cause why the Board should reconsider its decision of June 4th. Accordingly, the applicant's request for reconsideration is dismissed.

13. The section 89 complaint (File No. 0651-86-U) referred to in this decision was scheduled to be heard on August 1, 1986 as well as the certification matter. If the union wishes to proceed with the complaint it should advise the Registrar of its intent to do so as soon as possible.

1385-85-R; 0268-86-U Labourers' International Union of North America, Local 491, Applicant, v. **Klimack Construction Limited**, Respondent, v. Group of Employees, Objectors; Labourers' International Union of North America, Local 491, Complainant, v. **Klimack Construction Limited**, Respondent

Certification - Construction Industry - Board not engaging in inquiry to review geographic boundaries of Board area #19 - Determination of trade when time split between labourer and operating engineer

BEFORE: *Ken Petryshen*, Vice-Chairman, and Board Members *R. J. Gallivan* and *D. A. Patterson*.

APPEARANCES: *David Strang*, *Bill Suppa* and *Ray Doucette* for the applicant/complainant; *Lorenzo Girones* and *Alex Klimack Sr.* for the respondent; *Michael J. Glover* for the group of employees.

DECISION OF THE BOARD; September 30, 1986

1. This is an application for certification made under the construction industry provisions of the *Labour Relations Act*. We also have before us a complaint filed pursuant to section 89 of the Act which was filed in support of an application under section 8 of the Act.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.
3. The Board further finds that this application for certification does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the Act.
4. A hearing was held for the above matters on July 22nd and 23rd, 1986 in Timmins. The purpose of the hearing was to deal with a number of issues including the following: a bargaining unit description issue which was raised by the respondent; to hear argument on a Labour Relations Officer's report enquiring into the list and composition of the bargaining unit; and to deal with the respondent's allegations of misconduct on the part of the union which challenged the reliability of the union's membership evidence.
5. The applicant proposed a bargaining unit description encompassing all construction labourers in the employ of the respondent in Board area #19, save and except non-working foremen, persons above the rank of non-working foreman and persons employed in the industrial, commercial and institutional sector. In its reply to the application dated September 11, 1985 the respondent agreed to the bargaining unit description proposed by the applicant. By a telegram dated September 16, 1985 the respondent amended its reply in such a way as to put in issue the appropriate geographic scope of the unit.
6. In written submissions filed with the Board prior to the hearing and in his oral presentation at the hearing, counsel for the respondent argued that the Board should hold hearings for the purpose of inviting representations from interested parties in relation to "the revision of the geographical boundaries of area #19." Board area #19 is presently defined to encompass the area within a radius of fifty miles of the Timmins Federal Building and counsel argued "that it is not only capricious but irrational in terms of present day collective bargaining trends, and union representation and the geographical economic boundaries of present day District of Cochrane." Counsel

referred to the Board's comments in *John McLeod & Sons Ltd.*, [1970] OLRB Rep. July 462 wherein the Board stated at page 464 "that areas defined in terms of a radius are far from satisfactory and require a redefinition and perhaps enlargement." Counsel also directed our attention to a 1980 paper prepared by the Research Branch of the Ministry of Labour titled "Proposals for Re-organizing Board Construction Areas" which he submits concludes that there is a need to enlarge and reduce the Board areas. The representative of the objecting employees essentially adopted the employer's position while counsel for the applicant strongly argued that the Board should limit the geographic scope of the unit to Board area #19.

7. Having carefully considered the submissions of the parties, the Board is not inclined to adopt the position advocated by counsel for the respondent. Following the enactment in 1962 of the construction industry provisions of the Act prohibiting project certification, the Board established a number of standard geographic areas by reference to which it describes bargaining units in the construction industry. The Board has recognized that changing circumstances may require changes to the boundaries of the Board areas but, over the years, there have been only a few occasions where the Board found it appropriate to change the boundaries. Before changing the boundaries, the Board's general practice is to consult interested trade unions and employer organizations.

8. It appears that we have before us the first request to hold hearings to inquire into the appropriateness of the boundaries of Board area #19. We are not unmindful of the fact that the request is being made in the context of a certification proceeding and that if the Board altered the boundaries of Board area #19, it would have a considerable impact on this application. Counsel for the respondent was quite frank in admitting that his client's request was based in part on a selfish motivation. Without some indication that there is a general concern with respect to the boundaries of area #19 within the construction labour relations community, we would not be prepared to engage in the type of inquiry requested by the respondent. The existing well-established boundaries of Board area #19 appear to have served the construction community well. Accordingly, the Board will not engage in an inquiry at this time in order to review the geographic boundaries of Board area #19.

9. Having regard to the partial agreement of the parties and the Board's ruling on the geographic scope of the bargaining unit, the Board further finds that all construction labourers in the employ of the respondent within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. In a decision dated September 23, 1985, the Board (differently constituted) appointed a Labour Relations Officer to inquire into and report to the Board on the list and composition of the bargaining unit. Based on the evidence contained in the Officer's report, the Board entertained submissions from the parties on the following issues:

- (1) Whether Barry Godsoe, Alex Klimack and Philip Klimack exercise managerial functions within the meaning of section 1(3)(b) of the Act;
- (2) Whether Robert Humphrey and Denis Legault are construction labourers or operators as of the application date; and
- (3) Whether Sean McCormick is a student or ceased to be an employee prior to the date of the application.

After considering the evidence contained in the Officer's report and the parties' submissions, the Board advised the parties of its decision orally at the hearing on July 23, 1986. The Board indicated it found that Godsoe, Alex and Philip Klimack exercised managerial functions within the meaning of section 1(3)(b) of the Act. The Board advised the parties that it found Humphrey to be a construction labourer and therefore included in the bargaining unit while it found Legault to be an operator and therefore excluded from the bargaining unit for the purposes of this application. Board Member R. J. Gallivan dissented from the majority's opinion with respect to the status of Legault. Finally, the Board indicated to the parties that it found McCormick to be in the bargaining unit on the date of the application. The following sets out the reasons for the Board's findings.

11. The parties agreed that the evidence of Alex Klimack shall be representative of all the managerial challenges. Klimack's evidence reveals that each of the managerial challenges is in charge of a crew and makes out a time sheet for his crew. Klimack is involved in bidding for jobs and, if successful in obtaining the work, setting up schedules of work for each job. Klimack plays an effective role in hiring employees, laying off employees and in determining whether an employee will receive a raise in pay. Even though the managerial challenges perform physical labour, each exercises direct control over the employees they supervise. We were satisfied these facts demonstrate that Godsoe, Alex and Phil Klimack exercise managerial function pursuant to section 1(3)(b) of the Act and hereby confirm our oral ruling to that effect.

12. The evidence relating to Legault does not reveal that there was a trade in which he spent the majority of his time. It appears that he spent half of his time working as a construction labourer and the other half working as an operator. On the date of the application, Legault performed slightly more operators' work than labourers' work. We are satisfied though, that Legault was hired primarily to do the work of an operating engineer and that he was the person primarily responsible for performing such work when it was needed. See, *C.W.A. Contracting (London) Limited*, File No. 0781-84-R (unreported), March 21, 1985. Humphrey spent approximately thirty per cent of his time as an operator and the remainder as a construction labourer. On the date of the application, Humphrey essentially performed labourers' work. For these reasons we were satisfied that Legault was excluded from and Humphrey was included in the bargaining unit and hereby confirm our oral ruling to this effect.

13. The last day worked by McCormick was September 4, 1985, the date of the union's application for certification. McCormick was a student who was employed as a construction labourer. His evidence before the Labour Relations Officer was that he worked for five hours in the evening for the respondent cleaning trailers. Counsel for the applicant requested the Board to hear oral evidence from McCormick since it alleged the evidence of McCormick was not credible. After entertaining submissions on this point, the Board declined the applicant's request. We were satisfied that McCormick should be included in the bargaining unit and hereby confirm our ruling to that effect.

14. Once the parties were advised of the Board's decision with respect to the composition of the bargaining unit, it became clear that, at best, the applicant was in a vote position. After considering its position, the applicant requested leave of the Board to withdraw its section 89 complaint and its section 8 application. The Board consents that the complaint in Board File No. 0268-86-U and the union's application pursuant to section 8 be and they are hereby withdrawn. After considering its position, the respondent requested leave of the Board to withdraw its allegations of misconduct against the applicant since, in its view, the misconduct, if proved, could only lead the Board to order a representation vote. The Board consents that the allegations of misconduct raised by the respondent be and they are hereby withdrawn.

15. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 13, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

18. The matter is referred to the Registrar.

1978-85-U Ron Lawrence, Complainant, v. International Brotherhood of Electrical Workers, Local Union No. 120, Respondent

Duty of Fair Referral - "Two-job" rule in hiring hall applied to complainant but not travellers - Whether systemic discrimination breach of s.69 - Cogent labour relations purpose test applied prior to finding of discrimination

BEFORE: *Patricia Hughes*, Vice-Chairman.

APPEARANCES: *E. G. Posen*, *George Surdykowski* and *Ron Lawrence* for the complainant; *Bernard Fishbein*, *W. Arnezeder* and *G. Smithers* for the respondent.

DECISION OF THE BOARD; September 23, 1986

1. Ron Lawrence alleges that the International Brotherhood of Electrical Workers, Local Union No. 120 ("the union", "Local 120" or "120") has violated section 69 of the *Labour Relations Act* ("the Act") by failing to refer him to a job on which he had bid. Essentially, Lawrence alleges that the union did not apply its rules to him in a proper manner.

2. Lawrence has been a journeyman electrician since 1957. He has been a member of Local 120, International Brotherhood of Electrical Workers, since 1958. Lawrence explained that he had been working at the Bruce Generating Station for five and a half years and prior to May 1984, for four and a half years without interruption. The Bruce is within the jurisdiction of Local 1788 which will refer members of other Locals when it cannot supply its own. He admitted that the job at Hydro was good because it was steady work and close to his home in Ripley. He further agreed with counsel for the respondent that he did not have to worry about "bouncing cheques" or "cheating on the agreement" and that the job at the Bruce is a preferred job. During the operative period, Lawrence was still employed by Ontario Hydro at the Bruce power plant, but had been on strike since May 4, 1984. During the strike, he heard that there was a job available through Local 120, called the Local, found that the Canal job at Kellogg was available and decided to bid on that

job. What happened after he bid on the job is in dispute between the parties. It is not clear whether or not he was ever told that he would have the job, but it is clear that he was at some point informed that he could have the Canal job only if he quit Hydro and produced his separation slip. This requirement was in accordance with Rule 3 of Local 120's working rules, the "two-job" rule. Lawrence did not wish to quit Hydro and did not do so. Therefore, he did not obtain the Canal job. Lawrence did nothing further until June 4, 1984, when he called William Arnezeder, the business manager of Local 120, and said that he wanted to go to work. Arnezeder told Lawrence that he (Arnezeder) would have to go to the Executive Board on the issue of the application of the rules to striking members of Local 120 and that he would be able to give Lawrence an answer on June the 7th. At the Executive Board Meeting, there was a vigorous debate about how to apply Rule 3. Eventually, however, the members of the Executive Board decided to modify the rule so that members of Local 120 who were on strike would have priority on abandoned jobs (jobs on which no Local 120 members had bid) over travellers, that is, members of other Locals who could come into the London area, the jurisdiction of Local 120, for jobs. Arnezeder told Lawrence and two other members of 120 who were in the same position as Lawrence (that is, on strike) that the rule had been modified and that they could seek abandoned jobs. Again, there is dispute over what Lawrence was told with respect to the job that he eventually did get, but he did obtain a job at Zymaize at Stern Catalytic. He remained at that job until September 28, 1984, when the Hydro strike was over; at that time he quit Zymaize and returned to Hydro. This outline of the facts is not in dispute between the parties, except as indicated.

3. The operation of the hiring hall of Local 120 is set out in writing and the information is available to all members. Members are required to sign an "out-of-work" book to show they are out of work and, if they are prepared to be assigned out of town, they are required to sign the "out-of-town" book. The out-of-work book is public. Members are listed by the number of hours they have worked in the last twelve months, within the jurisdiction of Local 120, with those having worked the fewest hours at the top. Contractors requiring employees telephone the union office and the information with respect to the jobs is recorded on a dispatch slip. The dispatch slip will show the name of the contractor, the type of job, perhaps the length of the job and the number of employees requested and when they are required. At the end of the day all these requests are put on a tape on an answering machine and members can then call in and find out what jobs are available. The next day members can telephone and bid on any of the jobs and their bids are recorded in a "bid book". At 11:00 a.m. the bidding is closed and jobs are awarded on the basis of the number of hours members have worked within 120's jurisdiction. Members who have worked the fewest hours will get the jobs. If a job receives no bids, it is put on the tape again for a second time that evening and members can bid on it again until 11:00 a.m. the following day. Once a job has been placed on the tape for two days and no bids have been received, it is considered an "abandoned job". When a job is abandoned, the union will call other Locals to see if they have out-of-work members who could be referred to the jobs. The union prefers to provide work for travellers, who are also members of the IBEW, rather than have contractors hire employees "off the street". Members of other Locals are not required to sign the out-of-work book or the out-of-town book. Local 120 does not pass judgment on the employees sent by other Locals but, in effect, merely acts as a conduit between the other Local and the contractors within 120's jurisdiction. Arnezeder testified that when he called for travellers to come into Local 120's jurisdiction to take abandoned jobs, he depended on the business manager of the relevant Local to send him only unemployed workers. But he also said that it made sense not to require travellers to produce separation slips because there would be no reason for travellers to come to London if they already had jobs. He admitted that travellers would receive preference on abandoned jobs over employed (including striking) Local 120 members.

4. The specific rule at issue in this case ("the two-job rule") is the portion of Rule #3 which states:

No member will be dispatched to a job (in town or out of town) if he is employed at *ANY OTHER JOB* in the Electrical Industry. In order to substantiate this, a member must be able to produce his record of employment separation slip if asked to do so.

It appears in Local 120's written Work Rules and continues to appear in this form. The modification to the rule, which effectively changes "job" to mean "unabandoned job", has not been reduced to writing.

5. The two-job rule came into effect in 1981 after Arnezeder became business manager. Arnezeder testified that before he was elected to office, members were concerned that about fifty per cent of Local 120 members were working in the Sarnia area which was extremely busy. Because of lack of work in London, members had taken on other kinds of jobs rather than working as electricians. For example, some members were teaching and others were doing maintenance work. Under the previous system, a worker might take holidays from a job in Sarnia, take a job in London and then return to Sarnia. Teachers and maintenance workers would do the same in the summer when work was more plentiful in London. In other words, men who already had some kind of work were also getting work as electricians through the hiring hall in London. This infuriated the unemployed members and therefore the two-job rule came into being. It requires that any member who is already employed will quit that employment before taking another job, including abandoned jobs (that is, jobs on which no unemployed member of Local 120 has bid). Travellers, however, are eligible for referrals only when a particular job is abandoned, regardless of their employment status. The union would prefer members of other Locals to obtain such jobs, thereby retaining a link between the union or hiring hall and the contractor, rather than extinguish or diminish the link by having the contractor obtain employees elsewhere or "from off the street".

6. Although Lawrence does not challenge the unmodified rule itself, it is desirable to make clear that on the facts of this case, any such challenge would be misplaced. The two-job rule was established to ensure a more equitable distribution of available work. It seemed unreasonable that members who already had employment should be able to obtain a second job when there were members without any work at all. The rule is a rational way of distributing work. It is far from arbitrary, but is, rather, a rational and considered response to an actual problem facing the Local when Arnezeder became business manager. Ron Lawrence does not in fact question the fairness of the rule itself. He complains because it was applied to him and not to travellers. The difficulty arose because while Lawrence was employed when he bid on the Kellogg job and, therefore, clearly within the rule, he was not actually working because Hydro employees were then on strike. The fact is that the rule did not anticipate this situation. Under the province-wide bargaining scheme, the normal pattern is that all workers are on strike at the same time, not that some workers are on strike and others not on strike. However, there are exceptions to that pattern. Hydro is one such exception. The failure to anticipate the latter situation and to incorporate a contingency into the rule to deal with it cannot be seen as arbitrary in light of the usual reality of bargaining in the construction industry.

7. Furthermore, when the situation came to Arnezeder's attention (that there were three members - Lawrence, Lorne Freeman and Rex Johnson - who were on strike and were being treated as eligible for other employment only on condition that they quit their current job), he and the other members of the Executive Board addressed their minds to it and developed a solution to deal with the particular problem. Lawrence's counsel maintained that Arnezeder went to the Executive Board with the issue only because Lawrence threatened to go to the Human Rights Commission or the Labour Board. However, the evidence suggests that while Lawrence may have raised

the possibility of his doing so with Arnezeder, Arnezeder had already decided to bring the matter to the Executive Board at the June 5th meeting. At the meeting, the members were split. Some members believed that the striking members were in the same position as other employed members and that therefore they should choose between staying with Hydro, albeit on strike, and quitting Hydro and obtaining referrals elsewhere; they did not want to change or modify the rule. Other members were concerned that travellers were obtaining abandoned jobs while members of Local 120 were not eligible, even though they were not actually working. Arnezeder pointed out that with Local 1778 on strike, members of 1788 could get those jobs (because they were not subject to the two-job rule since they were not members of Local 120): this seemed unfair. Gerry Smithers, President of Local 120, testified that there was recognition that Local 120 could be in the position of treating Local 1778 members better than their own. For this reason the rule was modified to permit striking 120 members to obtain abandoned jobs before travellers. This modification was a rational way of dealing with the issue and reflects an attempt to balance the interests of all members of Local 120. In particular, the union has attempted to respond to the specific needs of members in the position of Lawrence, even though it does not place Lawrence in exactly the same position as other members of Local 120 with respect to bidding on all jobs. However, as observed by the Board in *Maurice Berlinguette*, [1986] OLRB Rep. February 194 at paragraph 21:

... Any set of hiring hall rules, procedures or guidelines will necessarily reflect a compromise which results from a balancing of those and other conflicting individual and group interests. From the perspective of the *Labour Relations Act*, the trade union is free to strike that balance as it sees fit, so long as it does not act in a manner which is arbitrary, discriminatory or in bad faith.

8. Lawrence claims that the way in which the two-job rule was applied to him constitutes a breach of section 69 of the Act. Section 69 states:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

9. More particularly Lawrence's allegations are as follows:

- 1) that the union acted in bad faith through Gerry Smithers, President of Local 120, when he required Lawrence to produce a separation slip from Hydro;
- 2) that the union acted in an arbitrary manner by rescinding Lawrence's referral to the Canal job on May 9, 1984; and
- 3) that the union discriminated against Lawrence by
 - (a) referring John Groom, Jim Matheson, Tony Davison and Thomas Keagan to jobs to which it did not refer Lawrence; and
 - (b) restricting Lawrence to the Catalytic job.

10. The power unions have over their members' economic well-being through the referral system imposes on unions a particular obligation with respect to their hiring hall processes, as indicated in *Joe Portiss*, [1983] OLRB Rep. July 1160, at paragraph 8:

To the extent that the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and classifications of employees, the union officer in charge of a hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall system effectively vests in those union officers

powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of a considerable amount of power over their lives. By the enactment of section 69 of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

The abuse of these powers was widespread in *Joe Portiss*. There is no similar allegation here (as openly conceded by counsel for the complainant) and all the evidence indicates that Arnezeder and the other officials run Local 120's hiring hall in a fair manner. Nevertheless, it is clear that the potential for abuse lies in the very nature of the hiring hall situation and that any allegation establishing a *prima facie* case that the system is not being applied fairly should be examined carefully.

11. In considering complaints under section 69, the Board is not intended to "second guess" the union's decision, nor to pass judgment on all aspects of the internal practices or policies of the union (except to the extent to which they are themselves motivated by bad faith or are arbitrary or discriminatory): see *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143; *Thomas Beck*, [1985] OLRB Rep. Jan. 14; and *Maurice Berlinguette*, *supra*. Unions are permitted to make mistakes; they will be held by the Board to account for such mistakes only if it can be shown that they are the result of conduct proscribed by section 69.

12. The first issue which must be considered is whether Smithers did act out of hostile animus towards Lawrence. The evidence is in dispute on this point. The major evidence with respect to the purported hostility of Smithers came from a witness for the complainant, Beverley DuMaresq. DuMaresq had been the business agent of Local 120 from 1971 to 1980 before Arnezeder assumed the position. In May, 1984, he was working on the Canal job. He testified that on the day that Lawrence was supposed to come to the Canal job, Smithers (who was the general foreman on the job) said that Lawrence was a "troublemaker of a sort" and he did not want him and that he told Smithers that Lawrence was a member of Local 120 and that he (Lawrence) came first. On cross-examination, he testified that Smithers approached him and said that Lawrence was coming on the job according to the bid system and because of troubles he had had with a previous business manager years ago, Smithers did not want him. The incident allegedly referred to by Smithers occurred before 1971, that is, over fifteen years ago. He said he did not know why Smithers was telling him about Lawrence. DuMaresq testified there was a lot of conversation on the site about Lawrence not having a quit slip from Hydro.

13. Smithers testified that he did probably have a conversation with DuMaresq because he had a conversation with a lot of people on the job with respect to this particular problem. He said that there was no particular reason that he would be talking to DuMaresq, but that it was in the nature of a construction job that everybody was interested in the problems that arose. He testified that he did not remember telling DuMaresq that he did not want Lawrence on the job because he was a disturber. He further testified that whether Lawrence got the referral slip was "not [my] call to make". He could not deny him the job anymore than he could give it to someone else. He also denied that he had any particular axe to grind with respect to Lawrence. Under cross-examination Lawrence admitted that Smithers did not have any particular axe to grind against him prior to this time and that it was Smithers' view that this was the rule and the way it should work. Smithers further testified under cross-examination that the first time that the two-job rule occurred to him was when Eric Chovancek, another Local 120 member on the Canal job, raised it with him, even though he knew Lawrence was at Hydro and on strike at the time. He confirmed Chovancek's interpretation with Don Thompson, Vice-President of the Local, who was a steward at the Kellogg's site. He stated that if he had let Lawrence have the referral slip, he would not have been doing his job and to say that Chovancek and others would have been unhappy would be to put it mildly. He said that there would be trouble at the next union meeting and that the pressure of his office compelled him to agree that Lawrence could not have the job without the quit slip. He was

prepared to give Lawrence a week or two to obtain the separation slip, as long as Lawrence indicated he would be quitting Hydro.

14. Eric Chovancek, a journeyman electrician on the Canal job, confirmed that he told Smithers that he would not be pleased if Lawrence came onto the Canal job without quitting Hydro and that he indicated that there might be trouble if Smithers permitted Lawrence to do so. He said that he would call the business agent and proceed himself if Smithers did not prevent Lawrence from coming onto the Canal job. He said that it seemed as if Smithers had forgotten about the two-job rule because he seemed quite surprised when Chovancek raised it.

15. Taking all the evidence into account, it is my view that Lawrence may well have believed that Smithers made some reference to his being a troublemaker. However, any comment that might have been made in that regard must be seen in the context of Chovancek's testimony. Any concern of Smithers arose not from the purported incident of over fifteen years ago, but because he believed that if he let Lawrence have the job, other Local 120 members would create difficulties. In my view the evidence does not support the allegation that Smithers acted out of hostile animus towards Lawrence.

16. The second issue is whether Lawrence was told he would be referred to the Canal job on May 9, 1984, and if so, whether that referral was rescinded. Counsel for Lawrence argues that the union's treatment of Lawrence with respect to this referral was arbitrary. A union will be considered to have acted in an arbitrary manner if its officials have acted capriciously or unreasonably or, put another way, if, where appropriate, they have failed to direct their minds to the complainant's concerns or failed to assess relevant factors in balancing the interests of the persons subject to its actions: *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791; *Leonard Murphy*, [1977] OLRB Rep. March 146; *De Havilland Aircraft of Canada Ltd.*, [1979] OLRB Rep. Oct. 933; *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067. The Board considered the meaning of "arbitrary" in the hiring hall context in *John Cooper*, [1984] OLRB Rep. Jan. 6. In discussing the exercise of discretion by the business manager, the Board stated at paragraph 38:

Neither the fact of discretion nor its exercise are, *per se*, illegal. Discretion is inevitable in the circumstances. The business manager must balance a number of factors in determining which of the available out-of-work members should be sent to a particular job at a particular time. In so doing, he may well make an honest mistake. But the question is not whether the business manager (and, vicariously through him the union) may have erred in some way or made a decision of which this Board, with hindsight, disapproves. Business agents, being human, will make mistakes or errors in judgment and may even appear to be inconsistent from time to time as they respond to the circumstances of the moment, and perhaps, subjective pleas for special consideration. The question is whether that discretion has been abused - for example, to benefit family or friends, or to punish political enemies (see *Joe Portiss*, *supra*). Obviously, nepotism and patronage have no place in the hiring hall system, nor should the Board condone reliance upon obviously extraneous factors. But where a union official honestly turns his mind to the circumstances at hand, and without malice or any improper intent makes a sincere effort to assess the situation and balance competing claims before dispatching employees, we do not think we should readily infer that the decision was "arbitrary" and illegal. The term "arbitrary" in section 69 was intended to connote a decision-making process that is reckless, cursory, consistent with a non-caring attitude or influenced by totally extraneous and irrelevant considerations.

17. Lawrence's version of the events involved in this matter differs slightly from the version set out by the respondent's witnesses. However, the major point of difference, whether or not Lawrence was ever told he had the Canal job, does not change the outcome of the decision, since, if indeed he was told that he had the job, it is my view that he had been told because the two-job rule had been forgotten. Lawrence initially testified that he found out from another member that the Canal job was available and called the hall to bid on the job between 9:00 and 9:30 a.m. on

May 14, 1984. He later agreed that he may have called on May 9, 1984. The bid book shows that Lawrence made his bid on May 9. He said he was told sometime between 11:00 and 11:30 a.m. on May 9 by Joanne MacEachern, Arnezeder's secretary, that he had the job. She has been Local 120's secretary for almost 10 years. It is her responsibility to record the bids and to issue referral slips. At 1:30 p.m. of the same day, Lawrence stated, he received a call from MacEachern, telling him he did not have the job because he did not have a quit slip from Hydro. According to Lawrence, she said that her orders were to cancel the work slip.

18. MacEachern acknowledges Lawrence's call and that she entered his name in the bid book, along with the number of hours he had worked in the jurisdiction of Local 120 over the past twelve months, that is, 300 hours. She knew that he was working at Hydro and that Hydro was not within the jurisdiction of Local 120. Before she talked to Lawrence, Smithers, the general foreman on the Kellogg job, called her to see who might be coming on the job. She mentioned two people, including Lawrence, and at that time, Smithers expressed no concern. However, Smithers called her back to tell her Lawrence had to quit Hydro as a condition of the referral. She relayed this information to Lawrence, but she also admitted she might have told Lawrence at some point that "it looks good" because of his low hours. Because Lawrence was upset, she put Smithers (who was acting in Arnezeder's place while Arnezeder was away) in touch with Lawrence to explain to Lawrence why he would have to quit Hydro if he wanted the Kellogg job. Lawrence did not quit Hydro or indicate he would do so and an unemployed member of Local 120, Abe Stevens, obtained the Kellogg job.

19. It is reasonable to conclude that Lawrence believed he had been referred or would be referred because he was told he had the lowest number of hours of anyone bidding for the job. Furthermore, I believe MacEachern intended to refer him to the job before being instructed not to do so by Smithers. However, I accept the testimony of MacEachern that she made no definite statement to him that he had received the job at that time. In any case, once the two-job rule had come to the attention of Smithers, it would not have been improper to rescind the referral even if Lawrence had in fact been referred. Or, put another way, this merely takes us back to the question of whether the two-job rule has been properly applied to Lawrence. The union conceded that they would not have given Lawrence the job; I conclude that any referral, if indeed there was one, would have been in contravention of the two-job rule (even in its modified form, since Kellogg was not an abandoned job) and any cancellation would have been for the purpose of conforming to the rule.

20. It should be mentioned that counsel for the union argued, although not strenuously, that there was no denial of a job because Lawrence had indicated he did not want the job once he learned Smithers was the general foreman on the site. In light of what followed and the further discussions with respect to the two-job rule, it seems clear that the union determined that Lawrence could not be referred because he would not quit Hydro and that any indication by Lawrence that he did not want the job (and I do not find as a fact that Lawrence did so indicate) was not the determining factor. All parties continued on the basis that Lawrence had wanted the job.

21. The referrals of four individuals were raised as evidence that the union had treated Lawrence unfairly. One was the referral of Tony Davison on June 14, 1984 after the modification of the two-job rule. Davison is Arnezeder's brother-in-law and a traveller, a member of Local 1788. In *Joe Portiss, supra*, the preferential treatment of relatives was only one of many abuses in the operation of the referral system. I find no such abuse here. Davison was on strike; at that point, Lawrence would have been given preference over a traveller if he had applied for the same job. The business manager of 1788, Davison's Local, had told Arnezeder to take Local 1788 men in the order they approached Local 120; Davison was the first man to approach Local 120. Two

other individuals, John Groom and Jim Matheson, were also referred to jobs on June 7, 1984, the date on which Lawrence was referred to the Catalytic job. However, these two men were unemployed members of Local 120 and their referrals were simply the result of the proper operation of a system which constitutes an attempt to achieve an equitable distribution of available work. None of these instances of referral therefore indicates that the union treated Lawrence unfairly.

22. The fourth referral raises the greatest difficulty. It occurred prior to the modification of the two-job rule. Lawrence alleges the application of the rule is discriminatory because a traveller, Thomas Keagan, in the same position as himself (on strike at Hydro) was able to obtain an abandoned job when he was not.

23. There are three questions which must be addressed with respect to whether Lawrence was discriminated against by Local 120 with respect to the Keagan referral. The first is whether there must be intention before discrimination can be said to occur; the second is whether a distinction between travellers and members of Local 120 constitutes the kind of distinction considered discrimination within the meaning of section 69 of the Act; and the third is whether there is a cogent labour relations purpose for the two-job rule which either results in there being no discrimination or in the discrimination being justified.

24. A finding of discrimination does not require that the person alleged to have been acting in a discriminatory manner was motivated by malice or intended to do so, whether so motivated or not. In *Douglas Aircraft Co. of Canada Ltd.*, [1976] OLRB Rep. Dec. 779, the Board stated that the "union may not act in a manner that will result in discrimination"; however, in that case, there was differentiation on the face of super-seniority provisions in the collective agreement which gave a benefit to some employees (because of their status in the union) and not to others. That is not the case here, where the two-job rule does not itself specify that travellers will be given referrals when members of Local 120 will not be. Counsel for Lawrence would have the Board go further and find that a rule which does not differentiate on its face may be discriminatory if its application results in a disadvantage to a person because he is a member of Local 120 and not a traveller. He called this "systemic" discrimination. Systemic discrimination results when a neutral rule has a disproportionate negative impact on individuals because they belong to a certain group or possess certain characteristics. The issue here is less systemic discrimination than differential application. It is not the rule itself which has the alleged discriminatory result on Lawrence but the fact it is applied to him and not to travellers. Discrimination would result if it were not applied to someone else in the same position. With respect to the question of intent, the Supreme Court of Canada has held that intent is not necessary for a finding of discrimination: *Re Ontario Human Rights Commission et al and Simpsons-Sears Ltd.*, (1985) 23 D.L.R. (4th) 321 (S.C.C.) and *Bhinder et al v. Canadian National Railway Co. et al*, [1985] 2 S.C.R. 561. In both cases, the relevant legislation does not explicitly state that intention is not necessary, but the Supreme Court nevertheless held that intention was not a necessary prerequisite to a finding that the legislation had been contravened. While these cases were filed under the Ontario *Human Rights Code* and *Canadian Human Rights Act*, respectively, I see no reason not to apply this principle to the Ontario *Labour Relations Act*. It has already been applied under the Ontario *Employment Standards Act*: *The Brantford General Hospital v. The Director of Employment Standards*, (Ont. Div. Ct.; March 3, 1986) (leave to appeal by the Hospital refused). In that case, O'Brien, J., for the majority, stated:

The Supreme Court of Canada, in [*Simpsons-Sears*] ... made it clear the intent to discriminate is not a governing factor in construing human rights legislation. It is the result or effect of the alleged discriminatory action that is significant. There, although the court was considering the Ontario *Human Rights Code*, one of the points made was that the aim of such legislation is to remove discrimination, and the approach of the legislation is not to punish the discriminator but to provide relief to the victim of discrimination.

In my view, the same approach should apply when considering the [*Employment Standards Act*].

25. The concept of discrimination within the meaning of section 69 of the Act has never been restricted to the “traditional” or “invidious” forms of discrimination such as racial discrimination: *Ford Motor Company of Canada Limited*, [1973] OLRB Rep. Oct. 519. An intentional difference in treatment between travellers and members of Local 120 would likely fall within the prohibition against discrimination under section 69 of the Act, subject to the discussion of the “cogent labour relations purpose” test in paragraph 26 below. However, whether such a distinction would contravene section 69 in instances of systemic discrimination must be considered further. The nature of systemic discrimination is considered briefly below. It is sufficient to say here that a prohibition against systemic discrimination under section 69 (or section 68) would most likely be applied only to major distinctions, such as those based on race, sex or religion.

26. Not every instance of different treatment is prohibited by section 69 (or section 68) of the Act. The cases have followed two basic approaches: either discrimination is inherently limited (certain kinds of differentiation are not discrimination at all) or certain kinds of discriminatory treatment may be defensible: *Ford Motor Company*, *supra*; *Douglas Aircraft Co.*, *supra*; *Bernard Dorais*, [1985] OLRB Rep. March 408. The question is whether the “cogent labour relations purpose” test applied in these cases is to be applied before determining whether there has been discrimination or afterwards. Alternatively, the Board has the discretion not to grant a remedy where, although there may have been discrimination, it considers such discrimination not to be serious enough or of a type which warrants a remedy. Of these approaches, applying the cogent labour relations purpose test prior to determining whether there has been discrimination within the meaning of section 69 (or section 68) appears to be more consistent with the scheme of the Act. The Act does not explicitly permit the Board to apply a justification test after finding discrimination; and the discretion not to grant a remedy is more appropriately reserved for unusual situations, rather than being employed in the interpretation of a specific section of the Act. Under section 69 or section 68, the Board is to examine the differentiation alleged to contravene the section, determine whether there has been a *prima facie* case established, and if so, consider whether there is a cogent labour relations purpose for the conduct or rule involved. It may be that it will be more difficult to establish a cogent labour relations purpose with respect to certain kinds of differentiation than others, but that remains to be considered on the facts of each case.

27. Keagan was sent to 120 when Arnezeder called (or instructed his secretary to call) the business manager of Kitchener Local 804 to tell him that there was work available in the London area for travellers. Keagan was referred to the Brinkman's Electric job on May 25, 1984. Keagan was the President of Local 804 and there is no doubt that Arnezeder and Smithers knew that. It is not clear that either Arnezeder or Smithers knew that Keagan was the person referred. Both Smithers and Arnezeder testified that they did not know that he was working at Hydro in Local 1788's jurisdiction during the operative time. Arnezeder explained that Lawrence did not get the Brinkman's job because he did not bid on the job and in any case, even if he had bid, 120 would have applied the two-job rule and he would have had to quit Hydro. (At this time, of course, the two-job rule had not been modified to give Local 120 members on strike priority over travellers with respect to abandoned jobs). Under cross-examination Arnezeder stated that he did not ask Keagan to produce a separation slip because the work rules did not apply to Keagan and that he counted on the business manager of Local 804 to send him only unemployed men.

28. Although he said he did not know Keagan's status at the time of the referral, Arnezeder stated that Keagan had in fact quit his job at Hydro after the strike began and before his call to Local 120. He said that he had sought out this information from the business manager of Local 804 because of the litigation. But Arnezeder admitted that if Keagan had been on strike, 120 would

have applied a different standard to him than to Lawrence. Counsel for the union urged me to infer from the circumstances that Keagan was not on strike at Hydro and therefore not in a similar circumstance to Lawrence. He argued that there was no evidence before me to show that Keagan was in Lawrence's position in continuing to be on strike at Hydro and reminded me that the onus was on Lawrence to show that indeed that was the case. He pointed out that the strike at Hydro ended in September, at which time Lawrence was quick to return to Hydro, while Keagan did not go back to Hydro but stayed at Brinkman's until December when he was laid off. Although I could make my finding on the basis of hearsay evidence since it is the only evidence before me on this point, I prefer to base my conclusion with respect to Keagan's status on the failure of Lawrence to show that Keagan was still at Hydro. There is no evidence that Keagan was employed at Hydro at the material time and therefore I find that in this particular instance, the evidence does not support the allegation that the union discriminated against Lawrence. A necessary element of a finding of discrimination, that the individuals being compared are in the same position, has not been established.

29. Although there is no evidence of actual discrimination against Lawrence, the union did have a rule which, as a consequence of its application to Local 120's members and not to travellers, resulted in Local 120's extending more favourable treatment to travellers than to certain of its members. Since this circumstance constituted a major element in the submissions of counsel for the complainant, I propose to consider briefly whether the referral of Keagan would have contravened section 69 of the Act, if Lawrence had established that Keagan had been on strike at Hydro at the time of the referral.

30. Even if Keagan had been on strike at Hydro, I would not have found the union liable under section 69. I have already found the rule to be a rational response to an unsatisfactory situation and to be a method of distributing work fairly and equitably. The two-job rule has a cogent labour relations purpose. Furthermore, it was rational to try to fill job requests by referring travellers when unemployed members of Local 120 did not want the jobs in order to keep the work within the union, even though travellers were not subject to the referral rules. Under the circumstances, I do not believe it was unreasonable for Arnezeder to trust other business managers to send him only unemployed members of other Locals, or to assume that a traveller willing to come into 120's jurisdiction would be unemployed. In other words, I do not believe Arnezeder acted in a manner contrary to section 69 in making those assumptions. In my view, even if a striking traveller had been referred to an abandoned job denied Lawrence, there would not be a contravention of section 69.

31. It has not yet been established that the term "discrimination" in section 69 (and section 68) of the Act encompasses systemic discrimination. However, any such interpretation of the term must be developed within the context of labour relations practice and policy and specifically with reference to the purpose of section 69. The Labour Relations Board will not tell a union how to run its hiring hall; that is not the role of the Board, nor should it be. However, the Board has been given jurisdiction to consider allegations of referrals which are arbitrary, discriminatory or in bad faith: essentially, to determine whether denials of referrals have been for illegitimate reasons. That jurisdiction cannot encompass every incidental effect of the application or implementation of the system. It would therefore be unreasonable to consider every instance of systemic or unintentional discrimination a contravention of section 69: that would cast a wide net indeed. On the other hand, it is not unreasonable to expect a union to consider the effect of its conduct and rules on major groups of persons for whom it is the bargaining agent. In particular, distinctions based on race, sex, religion and disability might raise concern. For example, a rule which gave preference to a specific job classification might unintentionally operate to the disadvantage of women who were clustered in another classification which was not given preference. In distinguishing those instances

of systemic discrimination which would be caught by section 69 and those which would not, the Board may consider a variety of factors, such as, but not only, the nature of the discrimination, the way in which it arose, the way in which the union dealt with this matter, the balance between the type of discrimination and the importance of the rule and the effect of a finding that there has been a contravention of section 69, this last being in effect a consideration of labour relations policy. In this case, the distinction between travellers and Local 120 members arose because the union acted on reasonable assumptions about which doubts were raised only when an unusual circumstance occurred. The Executive Board of Local 120 addressed its mind to the problem arising from the Hydro employees' strike and the effect it had on the application of the two-job rule and modified the rule to assist its own members. The significance of the type of differentiation involved is outweighed by the importance of the rule to the equitable functioning of the referral system. It is not reasonable to conclude that even if there were discrimination in this case (and I have found a necessary element of a finding of discrimination has not been satisfied), it would be of such a kind and so detrimental with respect to the treatment of individual union members or particular categories of members that it warrants a finding by the Board that Local 120 contravened section 69 of the Act.

32. The next distinct issue which arises is whether Lawrence was restricted to the Catalytic job or whether he was able to claim any abandoned job. It is Lawrence's evidence that he was told that that was the only job he could have and that the Executive Board had made that decision. He testified that Arnezeder stated during the telephone call of June 7th that the only job he could have was at Zymaize at Catalytic. He said that he did not like it because it paid a dollar less than regular construction jobs, such as Kellogg's Canal job or Brinkman's, but that it was a job. He testified that he bid for no more jobs because he had been told Catalytic was the only job he could have. (Lawrence admitted that the Catalytic job did not end up as a bad job. However, if the issue of the desirability of the job means anything at all, it must be assessed at the time the job was offered.) Smithers denied that there was any discussion at the Executive Board meeting of June 5, 1984, when the two-job rule was discussed, about restricting Lawrence to the Catalytic job or to any particular kind of job. He denied in fact that there was any discussion at all about Lawrence getting the Catalytic job. Arnezeder testified that the Executive Board did not determine what job Lawrence could have and that that was the task of the Business Manager in accordance with the bylaws. Indeed, the Executive Board could not know what job Lawrence would get since the Catalytic job was still in progress and it would only be at 11:00 a.m. on Wednesday, June 6, 1984, that it would be known it was abandoned. The first opportunity to bid on the Catalytic job would have been on June 5th, the day of the Executive Board meeting. Arnezeder also testified that if Lawrence had not liked the Catalytic job, he could have quit and returned to his original status and bid on another abandoned job. Lawrence believed that Arnezeder's use of the phrase "take it or leave it" in connection with the Catalytic job indicated that it was the only job that he could have. I am not convinced that Arnezeder used the phrase in that sense, although I do believe he used those words. Rather, I think it is consistent with the use of those words that Arnezeder was letting Lawrence know that he could have the job or he could decide not to take the job and that there would be other opportunities for Lawrence to bid on abandoned jobs. Lawrence agreed with respondent's counsel when counsel suggested to him that Arnezeder had said that he could get any abandoned job and that Stern Catalytic was an abandoned job. I find then that Lawrence was not restricted to the Catalytic job and that if he believed he was, then it was a misunderstanding on his part. Thus his further allegation that the job Keagan obtained was preferable to the one at Stern Catalytic which he (Lawrence) later obtained is also dismissed. Assessing these jobs at the time they were referred (and not as they eventually turned out), it is my view that while the Stern Catalytic job paid \$1.00 less, it cannot be said to constitute discriminatory treatment that it was made available to Lawrence.

33. Counsel for the complainant urged me to award the complainant costs if I found in his favour. That issue does not arise since I have dismissed the complaint; however, even if I had found that the union had breached section 69, I see no reason in this case to depart from the Board's usual practice not to award costs as set out in *D'Alessandro and Marinaro*, [1985] OLRB Rep. Dec. 1708.

34. For all of the foregoing reasons, the complaint is dismissed.

0911-86-U; 0998-86-U; 0868-86-U The Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto, Frank Michelucci, Derwent Lewis, and Jack McCarron, Complainants, v. Sean O'Ryan; The United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, Local 46; Metropolitan Plumbing Contractors Association; Urban Mechanical Contractors Limited; Zentil Plumbing and Heating Co. Ltd.; Lou Pupolin Plumbing & Heating Co. Ltd.; Brady & Seidner Ltd.; DiMarco Plumbing & Heating Co. Ltd.; Keele Plumbing & Heating Ltd.; Municipal Plumbing & Heating Ltd.; Cesan Mechanical Systems Ltd.; D. Zentil Mechanical Ltd., Respondents; Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto, Applicant, v. Sean O'Ryan; The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46; Urban Mechanical Contractors Limited; Zentil Plumbing and Heating Co. Ltd.; Lou Pupolin Plumbing & Heating Co. Ltd.; Brady & Seidner Ltd.; DiMarco Plumbing & Heating Co. Ltd.; Keele Plumbing and Heating Ltd.; Municipal Plumbing & Heating Ltd., Respondents

Accreditation - Evidence - Practice and Procedure - Whether present panel of Board will review 1973 decision of another panel to issue accreditation certificate - Whether evidence relating to conversations with a mediator admissible

BEFORE: *Harry Freedman*, Vice-Chairman and Board Members *D. A. MacDonald* and *N. Wilson*.

APPEARANCES: *G. Grossman*, *W. J. McCarron* and *D. Lewis* on behalf of the complainants/applicant; *M. E. Geiger*, *Howard Roher*, *Edward J. Winter* and *Martin Rosenbaum* on behalf of Metropolitan Plumbing Contractors Association, Urban Mechanical Contractors Limited, Zentil Plumbing and Heating Co. Ltd., Lou Pupolin Plumbing and Heating Ltd., Keele Plumbing and Heating Ltd., DiMarco Plumbing and Heating Co. Ltd., Municipal Plumbing and Heating Ltd., Cesan Mechanical Systems Ltd., D. Zentil Mechanical Ltd.; *L. C. Arnold* and *V. McNeil* on behalf of Sean O'Ryan and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46; no one appeared on behalf of Brady & Seidner Ltd.

DECISION OF THE BOARD; September 18, 1986

1. These consolidated complaints and application for consent to prosecute arise principally out of conduct that the parties allege violated sections 131(1) and 132 of the *Labour Relations Act*. Sections 131(1) and 132 provide in part:

"131.(1) No trade union...that has bargaining rights for employees of employers represented by an accredited employers' organization and no such employer or person acting on behalf of such employer, trade union...shall, *so long as the accredited employers' organization continues to be entitled to represent the employers in a unit of employers*, bargain with each other with respect to such employees or enter into a collective agreement designed or intended to be binding upon such employees and if any such agreement is entered into it is void.

132. *An accredited employers' organization, so long as it continues to be entitled to represent employers in a unit of employers*, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the unit, whether members of the accredited employers' organization or not."

[emphasis added]

2. At the hearing on September 8, 1986, the Board received full submissions on a preliminary issue raised by counsel for the corporate respondents relating to whether this panel of the Board should find as a matter of law, that the Board erred in law and exceeded its jurisdiction when it issued an accreditation decision and certificate to the Metropolitan Plumbing and Heating Contractors Association, a division of Mechanical Contractors Association Toronto, in April 1973. Since both section 131(1) and 132 require a determination of whether there was at times material to this matter "an accredited employers' organization [that was] entitled to represent employers in a unit of employers", a finding by the Board that the accreditation decision and certificate was issued as a result of errors of law or jurisdiction and was therefore of no force or effect at the times material to this matter, would result in the dismissal of the complaints and application.

3. After receiving the submissions from counsel for the corporate respondents, the hearing adjourned. The next morning, counsel for Sean O'Ryan and Local 46 had no comments to make on the submissions. The Board did not call on counsel for the complainants/applicant who rely on the validity of the accreditation decision and certificate to reply to the submissions and delivered the following decision orally at its hearing on September 9, 1986:

Mr. Geiger, counsel for the corporate respondents, by letter filed with the Board on September 5, 1986 raised allegations that, counsel claimed, demonstrated that the Board (differently constituted) acted beyond its jurisdiction when it granted an accreditation certificate to the Metropolitan Plumbing and Heating Contractors Association, a division of Mechanical Contractors Association Toronto by decision dated April 5, 1973, in Board File No. 1339-71-R.

At the commencement of the continuation of the hearing in this matter on September 8, 1986 the Board received submissions from all counsel on how to proceed with the allegations raised. All counsel agreed that the complaints and application before us in this proceeding rested on whether the Metropolitan Plumbing and Heating Contractors Association, a division of Mechanical Contractors Association Toronto was an accredited employers' organization entitled to represent employers in the unit of employers described in the certificate of accreditation. While the Board had already decided in an earlier decision in this matter dated July 18, 1986 that it would neither determine the actual geographic scope of the bargaining unit for which the accredited employers' organization received bargaining rights in 1973, nor

what exactly the accredited employers' organization is as preliminary matters, Mr. Geiger's allegations went further by asserting that the accreditation certificate and decision of 1973 was a nullity or was void. Counsel submitted that the determination of that issue, that is, whether the Board's decision of April 1973 was a nullity or void ought to be dealt with as a preliminary matter because that issue, if determined in the way sought by Mr. Geiger, would be dispositive of the matter before us. Following the submissions of counsel on the procedural point, the Board ruled orally:

"Having regard to the preliminary submissions made by counsel, and what appears now to be the agreement of counsel, the Board will receive, as a preliminary matter, the evidence and submissions of the parties with respect to: (i) whether the Board should permit any party in this proceeding to challenge the validity of the accreditation decision and certificate issued by the Board on April 5, 1973 in Board File No. 1339-71-R and (ii) assuming that the Board will permit the challenge to be made, whether the accreditation decision and certificate granted to the accredited employers' organization the right under the *Labour Relations Act* to represent the employers in the unit of employers."

We note that while counsel for the complainant/applicant agreed to the Board dealing with the first issue, he did not agree that the Board should consider the second issue as a preliminary matter. Nevertheless, the Board entertained Mr. Geiger's submissions for the balance of the hearing day on September 8, 1986.

Mr. Geiger submits that the Board has the authority under section 106(1) of the Act to decide all questions of fact or law that arise in any proceeding. He submits that he is not seeking to have this panel of the Board reconsider the decision of the panel that granted the accreditation certificate and expressed serious reservations about this panel's ability to act in that capacity. Counsel referred us to the decision of the Board in *The Greater Niagara General Hospital* case, [1972] OLRB Rep. May 544.

Counsel submitted that the Board functions in a judicial like way and in making determinations of the factual and legal issues that arise in any case before it, must decide those issues in a way similar to the way in which the courts determine legal and factual issues. See *Rapid Ready Mix Limited* [1985] OLRB Rep. Jan. 104 at para. 6-9. Counsel argued that the validity of the accreditation order is a legal issue before this panel of the Board that the Board must address in determining the merits of this case. Counsel submitted that this panel would not be acting as an appellate panel but rather would be examining the decision and record of the Board in the accreditation proceeding to determine whether errors of law on the face of the record or jurisdictional errors had been committed by the Board in that case. That process of review would be similar to the review process undertaken by the Divisional Court in an application for judicial review except that this panel's consideration of the legal issues raised would not be limited by the privative clause that limits the scope of the Divisional Court's review of Board decisions to jurisdictional error.

Counsel submitted that the Board's decision of April 1973 contained patent

jurisdictional errors. Without setting out the nature of the errors claimed, suffice it to say that the errors that counsel submits the Board made are only apparent from an examination of the filings made by the parties and the employers who submitted employer returns in the accreditation proceeding. The Board's decision itself does not, in our opinion, disclose on its face any errors of jurisdiction or law. Those alleged errors of jurisdiction or law only become patent by reviewing the material in the Board's file of that matter.

For purposes of this decision, we assume that the Board in 1973 issued an accreditation certificate in respect of the geographic area and sector described in that certificate based in large part upon employer filings that indicated that the majority of the employers and employees in respect of whom the necessary determinations had to be made were not working in the area and sector described in the bargaining unit found by the Board to be appropriate. The Board's consideration of those employers and employees when it decided to grant the accreditation certificate, counsel submits, created a jurisdictional error that must result in our determination that the accreditation certificate and decision is a nullity.

While counsel does not say that he is asking us to reconsider that previous panel's decision, he wants this panel of the Board to find that the decision of a previous panel, as a matter of law, is a nullity. It seems to us that the practical effect of counsel's submission, if successful, is for this panel to revoke the decision made by a previous panel of the Board.

In the circumstances of this case, we are not prepared to accede to counsel's request, even assuming that the Board's decision was made as a result of both errors of law and jurisdiction.

The decision of April 1973 created a bargaining structure in the residential sector of the construction industry. That structure had been in place for more than 13 years when the dispute that gave rise to this proceeding began. That structure existed and exists because of the accreditation certificate. None of the persons Mr. Geiger represents who had notice of that accreditation proceeding chose to challenge the validity of that decision when it was issued in 1973. There are also other persons that Mr. Geiger represents who subsequently became subject to that accreditation certificate that chose not to challenge the validity of that decision when they first became bound by it. Several rounds of collective bargaining have taken place pursuant to that accreditation certificate. Therefore, we do not believe that it is appropriate for parties now, by way of this proceeding, to attempt to have the Board in effect revoke the accreditation order made by the Board in 1973.

We believe that a certificate of accreditation must be viewed as conclusively establishing the granting of bargaining rights pursuant to section 106(1) of the *Labour Relations Act* until that certificate is revoked or quashed. Even if the certificate was issued as a result of a misapprehension of the law or of the evidence presented to the panel of the Board that decided to grant it or both, the need for certainty and stability in labour relations militates against subsequently questioning the validity of the bargaining rights created by the certi-

ificate in another proceeding in which the existence of those bargaining rights is an issue, albeit an important issue.

If a person affected by a certificate of accreditation issued by the Board wishes to question its validity, that person should do so in the proceeding that gave rise to the certificate or in some other forum.

Furthermore, while our approach to disposing of this issue is akin to the approach of a panel of the Board being asked to reconsider one of its own decisions, we also expressly reject counsel's submission that this panel of the Board should determine whether a previous Board decision of another panel in a different proceeding was correct in law or made within its jurisdiction as part of its authority to determine issues of law in this proceeding.

In *Knight Security Guards Limited*, [1970] OLRB Rep. June 377 at 380, the Ontario Court of Appeal determined that while the Board's interpretation of the *Labour Relations Act* was incorrect, that error was not reviewable. After the court's decision, a party sought reconsideration of the original decision that had not been quashed on the grounds that the Board erred in law in misinterpreting the *Labour Relations Act*. That party also sought to have a panel of the Board different from the one that originally heard the case deal with the matter. In rejecting that request, the Board wrote at paragraphs 9 and 10:

"9. The decision dated September 17th, 1968 is not merely the decision of a division of the Board which heard the case but is, in fact, the decision of the Board. It is trite to say that the jurisdiction conferred by section 79(1) (now section 106(1) of the Act, whereunder the Board may reconsider any decision, must be exercised by the division which is seized of the matter. The very act of reconsideration contemplates that the matter will be considered again by the division which considered the matter the first time. If section 79(1) (now section 106(1)) contemplated that a decision of one division could be reviewed by another division of the Board, the Act would have provided for review rather than reconsideration.

10. The Board has never adopted the practice of having one division of the Board to sit in appeal on decisions of another division. In our view, the Act is not broad enough to permit the Board to set up an appellate division in the manner suggested by the applicant in this case."

It appears to us that Mr. Geiger's submission that the Board, as a matter of the exercise of jurisdiction under section 106, can determine that another panel of the Board erred in law or jurisdiction in issuing a certificate, runs squarely into the view that one panel of the Board ought not to act as a review or appellate panel over another panel of the Board.

Section 106(1) of the Act states:

"The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and *the action or decision of the Board thereon is final and conclusive for all purposes*, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling."

[emphasis added]

In our opinion, the Board's decision of April 1973 was "final and conclusive for all purposes", when it granted the employers' organization bargaining rights in the unit described in the accreditation certificate. That decision remains in effect until revoked or quashed. We do not think it is appropriate to exercise the kind of review power, even assuming we have it, that Mr. Geiger contends we ought to exercise to find that the accreditation certificate is a nullity or is void, or was made without jurisdiction.

If Mr. Geiger was seeking reconsideration or revocation of that decision, we would decline to exercise our discretion to do so, assuming that this panel could revoke a decision of another panel of the Board, for the reasons expressed earlier. Therefore, the Board will continue to rely on the certificate of accreditation as validly creating bargaining rights until such time as that decision is revoked or quashed by an appropriate tribunal.

4. The Board made the following evidentiary ruling during its hearing on September 9, 1986:

During the testimony in chief of Jack McCarron, director of labour relations of Mechanical Contractors Association Toronto, the Board expressed a concern over hearing evidence relating to conversations with a mediator. During the discussions with counsel about that concern, it became apparent that a great deal of evidence about discussions and meetings where a mediator was present or participated would attempt to be introduced.

Section 111 of the Act provides that information received by or furnished to a mediator in the course of attempting to effect a collective agreement shall not be disclosed, and further that a mediator is neither competent nor compellable as a witness in respect of the information or statements given to or made by him in attempting to effect a collective agreement.

It is apparent to us that the legislature recognized that the efforts made by a mediator to effect a collective agreement would be seriously hampered or be made ineffective if mediators were required to disclose what took place in bargaining. That is accepted, and no party suggests that the mediator should be called to give evidence in this proceeding. However, the parties may wish to adduce evidence of what the mediator said to them and what they said to the mediator. In our view, conversations that took place with the mediator in the presence of both the union and the employer representatives to the extent that the evidence of the contents of those conversations is relevant, and is not hearsay, is clearly admissible. (See *Shaw Almex Industries Limited*. [1984] OLRB Rep. Jan. 109.

However, we are also satisfied that we ought not to permit any evidence of what a mediator may have said to either the employers or the union in the other's absence. To do so would lift the veil of confidentiality that section 111 creates for mediators when they endeavour to effect a collective agreement. Furthermore, a party could, with impunity, testify as to what a mediator told him in private knowing that such evidence could not be contradicted or tested since the mediator could not be called to give evidence about those statements. In our opinion, the inherent danger in letting a witness give evidence about what he was told by a mediator, since it cannot be tested,

together with what we see as the purpose of section 111 of the Act causes us to refuse to admit evidence about what a mediator says to one party in the absence of the other.

We are also troubled about whether to admit evidence about what one party said to the mediator in private. The concern expressed by the Board in *Shaw Almex Industries Limited*, *supra*, at paragraph 16 is shared by us. The Board there stated:

"...we do not accept the argument that testimony concerning one party's private conversations with a conciliation officer or mediator should be accepted in evidence as prima facie proof of what must have taken place between the mediator or conciliation officer and the opposite party. Apart from the doubtful logic and, in the case of statements by the mediator, the hearsay dangers involved in that approach, its adoption would completely undermine the confidentiality of such private conversations. One party's revelations would force the other party to reveal his version of what he said to the mediator. Both parties would then clamour for permission to call the mediator to resolve the inevitable inconsistencies. Even on a question (if relevant) of the party's mental state, any inference that might be drawn from the party's version of his conversations with the mediator is no more trustworthy than his direct statement of what he was thinking at the time, since the other participant in the alleged conversation is not a compellable witness. Reference to the conversation, therefore, adds nothing but further adverse pressure on the confidentiality, and thence the efficacy, of the conciliation process."

However, we are satisfied that where the evidence of what was said to the mediator in private is relevant for some purpose other than proving that that communication was conveyed to or received by the other party, it is admissible, subject to it being relevant and not hearsay. The admission of such evidence would not, in our opinion, impinge on the purpose of maintaining confidentiality of mediation discussions aimed at effecting a collective agreement.

Similarly, we see no reason not to hear evidence about what the mediator did in the presence of one of the parties, save to the extent that his conduct is introduced for the purpose of proving that he communicated information to that party, and subject of course, to that evidence being relevant and not introduced for a hearsay purpose.

1635-85-R The Canadian Union of Public Employees, Applicant, v. **Metropolitan Separate School Board**, Respondent, v. Ontario Public Service Employees Union, Intervener #1, v. Ontario English Catholic Teachers Association, Intervener #2

Bargaining Unit - Certification - Union seeking unit of full-time Heritage Language Instructors - Board surveying practice in defining units in education sector - Whether practice of separating full and part-time employees applicable

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *W. H. Wightman* and *W. F. Ruthford*.

APPEARANCES: *Harold F. Caley*, *Helen O'Regan* and *Jack Bird* for the applicant; *Barry W. Earle* and *Vincent Nichilo* for the respondent; no one appearing for intervenor #1; *David I. Bloom*, *Doug Knott* and *Ed Alexander* for intervenor #2.

DECISION OF THE BOARD; September 9, 1986

I

1. In this application, the Canadian Union of Public Employees ("CUPE") seeks to be certified as the exclusive bargaining agent for a unit of "full-time" Heritage Language Instructors employed by the respondent school board. The major issue at this point is whether that is an appropriate bargaining unit of employees of the respondent.

2. In its application, CUPE described its proposed bargaining unit as follows:

All employees of the respondent in Metropolitan Toronto employed as Heritage Language Instructors, save and except Supervisor [sic], persons above such rank and persons for which [sic] any trade union held bargaining rights on the date of application.

In paragraph 4 of its application, CUPE stated that there were approximately 121 employees in that unit on the application date. In its reply, the respondent stated that there were approximately 392 persons in the bargaining unit proposed by CUPE. While it used different language to describe the exclusion of persons in bargaining units for which trade unions (like the interveners) held bargaining rights on the application date, the respondent also took the position that a unit consisting of all Heritage Language Instructors would be appropriate. Representatives of the parties met with one of the Board's Labour Relations Officers. Among other things, they discussed the disparity in their respective estimates of the number of employees employed by the respondent in the bargaining unit proposed by the applicant. Since that discussion, the applicant has taken the position that Heritage Language Instructors regularly employed for not more than twenty-four hours per week should be excluded from the unit for which it seeks certification in this application. The respondent maintains that the exclusion of any Heritage Language Instructors would be inappropriate.

3. When this application first came on for hearing before us, we expressed concern that a unit limited to Heritage Language Instructors might be the equivalent, in the education sector, of an industrial bargaining unit limited to a single job classification or department, which is ordinarily regarded as inappropriate in the industrial context. We advised the parties that we required information about the terms and conditions of employment of all of the respondent's unorganized employees, and particularly those employees who might be described as "instructors", before making any bargaining unit determination. The hearing was adjourned to a later date, in order to give the parties time to prepare such information and to give notice to the respondent's employees of

the possibility that the unit found appropriate in this application might include employees other than Heritage Language Instructors.

II

4. The respondent was party to six collective agreements at the time this application was filed. Three of those agreements were with locals of the applicant CUPE. Local 1280 represents a unit of employees "engaged in maintenance, services and plant operations." Local 1328 represents a unit of "office, clerical and technical employees" and a separate unit of "teacher aides...save and except...persons regularly employed for not more than twenty-four hours per week." Local 590 of the intervener Ontario Public Service Employees Union ("OPSEU") represents a unit of "psychologists, psychometricians, social workers, speech pathologists, court workers, interpreters, community liaison officers and research assistants." Pursuant to the *School Boards and Teachers Collective Negotiation Act*, R.S.O. 1980, c. 464 ("Bill 100"), branch affiliates of the Ontario English Catholic Teachers Association ("OECTA") and L'Association Des Enseignants Franco-Ontariens have bargaining rights with respect to all employees of the respondent who are "teachers" within the meaning of clause 1(m) of that Act, and those branch affiliates have together negotiated a single collective agreement with the respondent. The term "teacher" in clause 1(m) of Bill 100 does not include "occasional teachers" as defined by paragraph 1(1) 31 of the *Education Act*, R.S.O. 1980, c. 129 as amended. The Metro Local of Ontario Catholic Occasional Teachers' Association represents all occasional teachers employed by the respondent.

5. In the respondent's view, the following categories of employees are unrepresented:

- Heritage Language instructors
- English as a Second Language instructors
- Citizenship instructors
- Adult Up-grading Class instructors
- Student supervisors
- Itinerant, non-academic music instructors
- Librarians employed at the respondent's administrative office
- Swimming instructors
- Change room attendants
- First and second language monitors
- Part-time teacher aides
- "Supply" teacher aides
- Summer school instructors.

Nearly all summer school instructors, and a substantial number of Heritage Language Instructors and English as a Second Language ("ESL") Instructors, have the qualifications of a "teacher" within the meaning of paragraph 1(1) 66 of the *Education Act*. OECTA takes the position that such employees (referred to by the parties as "Ontario Qualified teachers" and referred to here as

"certified teachers") fall within the bargaining unit assigned to it by Bill 100 and would necessarily be excluded from any unit of employees over which this Board could have jurisdiction under the *Labour Relations Act*. The statutory interpretation on which OECTA relies in taking that position seems consistent with the interpretation of the majority decisions in *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279 and *Ottawa Board of Education*, [1985] OLRB Rep. July 1139, both of which are currently the subject of applications for judicial review in which the Divisional Court has reserved its decision. The applicant appears to accept OECTA's position. The respondent does not accept OECTA's position, but has chosen not to dispute it in this application. In any event, the proper composition of the appropriate bargaining unit in this application was argued on the basis that the unit would not include any certified teacher.

6. Material filed by the respondent indicates that the Ministry of Education implemented a Heritage Languages programme in 1977, "to help students from Ontario's many ethnic groups retain a knowledge of their mother tongue and continuing appreciation of their cultural background, as well as to provide a new language learning opportunity for others." This programme "is intended for elementary school children whose parents wish them to attend language classes outside the regular school programme, after school, at weekends, or, when numbers permit, by extending the required five hour school day." School boards which implement Heritage Language programmes are provided with Ministry funding for that purpose. These programmes are designated as "continuing education classes" under section 9 of Regulation 262, the general regulation under the *Education Act* governing elementary and secondary schools. From an employment perspective, the significance of characterizing Heritage Language instruction as part of a continuing education programme is found in subparagraph 5 of section 9 of that Regulation, which provides an exception to a general requirement that school boards employ only certified teachers to teach:

A board may employ a person who is not a teacher to teach in a continuing education class a course that is not to be recognized for credit provided such person holds qualifications acceptable to the board for such employment.

Courses which are "recognized for credit" are courses for which the Ministry of Education would give credit toward a secondary school leaving diploma. Courses offered below the grade 9 level are not "credit" courses.

7. Where there is sufficient parental support for so doing, the respondent will extend the school day at a particular school by 30 minutes so that pupils attending that school can receive Heritage Language instruction during that extended school day for a total of two and a half hours per week. Pupils for whom Heritage Language instruction is not available on that basis may obtain such instruction from persons paid by the respondent to instruct at various community centres outside school hours on Saturday mornings or, in the case of Polish language instruction, on weekday evenings, in a single, weekly, 2-1/2 hour class. In the 1984-85 school year, three languages - Italian, Portuguese and Ukrainian - were offered on an "extended day" basis to nearly 27,000 pupils in 63 schools by 106 instructors. Those three and 12 other languages were offered in Saturday morning (or Tuesday or Thursday evening, in the case of Polish) programmes to approximately 6,700 students in 267 classes. It appears that these classes were held at approximately 60 "centres" in the Metropolitan Toronto area and that the number of instructors regularly involved in these programmes would be about the same as the number of classes. For convenience, these two methods of delivering Heritage Language instruction will be referred to as the "extended day programme" and the "Saturday programme" (which misdescribes, but is meant to include, the Polish Heritage Language classes conducted on weekday evenings). It is the respondent's uncontradicted assertion that the content of the Heritage Language programme is the same in the extended day programme as it is in the Saturday programme. The terms and conditions of employment of instructors in the two

programmes are different, however. In the course of their analyses of the employment of Heritage Language instructors, the parties identified seven categories of such instructors:

- instructors teaching full-time (30 hours per week) in the extended day programme
- instructors who work regularly in the extended day programme on a less than full-time basis (referred to as "percentage contract")
- instructors teaching in the Saturday programme
- instructors who work on a percentage contract in the extended day programme and also teach in the Saturday programme
- instructors in the Saturday programme who also act as supply teachers for the extended day programme
- persons who may be engaged as supply instructors for the extended day programme
- persons who may be engaged as supply instructors for the Saturday programme.

8. Although it is not necessary for those who teach Heritage Language classes to be certified teachers, that has been the recommendation of various committees and is the respondent's preference. On the application date, there were 23 certified teachers among the 91 persons who taught Heritage Language classes for more than 24 hours per week, and (excluding supply teachers) 31 certified teachers among the 228 persons who regularly taught such classes less than 24 hours per week. Certified teachers can and do move from the Heritage Language programme (particularly the extended day programme) into employment in the respondent's "regular" school program, where statutory teacher qualifications are ordinarily mandatory. Conversely, those without the statutory qualifications do not have that prospect.

9. Although the instructors with which we are concerned here are not certified teachers, they have academic and other qualifications for the teaching of a particular Heritage Language class. Their rate of pay is a function of the extent of their qualifications. Since the salary grid for teachers covered by the Bill 100 agreement and its predecessors deals with differentials in qualifications, the rates of pay of Heritage Language instructors were originally determined with reference to that grid and, until recently, subsequent percentage increases in the rates of pay for Heritage Language instructors have pretty well kept pace with those negotiated for teachers covered by the Bill 100 agreement. In the extended day programme, basic pay for instructors (other than "supply" instructors) takes the form of a salary. Supply instructors in the extended day programme are paid a "daily rate". Compensation for regular and supply instruction in the Saturday programme is paid as an "hourly rate". Salaried instructors receive benefits similar to those enjoyed by teachers covered by the Bill 100 agreement, except that their dental plan provides only 85 per cent coverage (as opposed to 100 per cent coverage under the Bill 100 agreement) and pension contributions for instructors who are not certified teachers are made to the OMERS plan and not the teachers' superannuation fund. Daily and hourly rated instructors do not receive such benefits. A full-time instructor in the extended day programme would work from 9:00 a.m. to 4:00 p.m. with a one hour lunch break each day, five days per week, for a total of 30 hours per week of employment in a school or schools. Some salaried instructors in the extended day programme are engaged on a part-time or "percentage contract" basis to work a specified percentage of a full-time work load. In the-

ory, such an engagement could be for any percentage, even 10 per cent. In practice, the respondent has difficulty finding people to take lower percentage contracts. The respondent's witness could only recall two 40 per cent contracts, and all others have been at or above 50 per cent. A "percentage contract" instructor is paid a pro-rata portion of the full-time salary for someone with similar qualifications and gets the same benefits. The hours worked by extended day Heritage Language instructors may be divided between two (or, occasionally, three) schools. Extended day Heritage Language instructors are encouraged to have the same sort of involvement in extra curricular activities as the teachers at the school (or schools) where they instruct.

10. The respondent provides instruction in English as a Second Language ("ESL") to children during the regular school day and to adults in day and evening classes. ESL classes for children in the regular day school are all taught by Bill 100 teachers who would be excluded from any unit we might devise in this matter, so the evidence before us did not address in any detail that aspect of the teaching of ESL. At the relevant time, the respondent had 91 employees ("ESL instructors") teaching English as a Second Language to adults. A majority of these are certified teachers. ESL instruction is offered both in schools and in community centres. As with Heritage Language instruction, this ESL instruction is part of the continuing education programme. The hours of work of ESL instructors vary depending on the number of classes they teach. Evening classes, for example, last for two hours and are offered four evenings a week. An ESL instructor who instructs only in the evening would not work more than eight hours per week. Because of the hours of instruction available to be performed during the day, an ESL instructor could work as many as 25 hours per week. The number of hours actually worked by day time ESL varies. All ESL instructors are paid the same hourly rate, regardless of differences in qualifications, and receive no benefits.

11. The respondent also offers citizenship instruction as part of its continuing education programme. These classes are offered in the evenings at various centres, usually schools. A course of citizenship instruction lasts for six to eight weeks and each evening class lasts for two hours. A citizenship instructor could work no more than four evenings per week and, so, would work a maximum of eight hours per week. Many of the citizenship instructors are people who have applied for but not received positions as Heritage Language instructors. All citizenship instructors are paid the same hourly rate and receive no benefits.

12. Although such classes were not in operation at the time this application was filed, the respondent does offer adult upgrading ("Adult Basic Literacy and Numeracy") classes as part of its continuing education programme. In previous years, these were evening classes of 2 hours duration taught by instructors who received an hourly rate and no benefits. The witness who gave evidence on behalf of the respondent indicated that the respondent's adult upgrading programmes were being "revamped", and he was not sure whether this would result in any change in the terms and conditions of employment of adult upgrading instructors.

13. The respondent's summer school classes are also part of the continuing education programme. Summer school involves instruction of school-aged children in subjects which are also taught to such children during the regular school year. The teaching of credit courses at the high school level is a major part of the summer school programme. All but six of the 516 teachers employed in the respondent's 1985 summer school were certified teachers. It is not apparent what subjects those six taught.

14. Itinerant Non-Academic Music Instructors are professional musicians employed by the respondent to teach music classes in certain of its schools. These classes are not classified as continuing education, but do fall under the ultimate supervision of the Curriculum and Special Services

Department, which is responsible for continuing education programmes. These instructors are not certified teachers. They have a variety of work schedules. An Itinerant Non-Academic Music Instructor may teach in one, two or three schools at various times, for between three and six hours per day, one to five days per week. As of the application date, 12 of the respondent's 28 Itinerant Non-Academic Music Instructors worked more than 24 hours per week. All of them are paid on the basis of an hourly rate. If they work more than 14 hours per week, they also receive benefits similar to those enjoyed by salaried teachers.

15. The respondent's administrative structure has two main branches, which are labelled "Academic" and "Business & Finance" on its organizational chart. The Business and Finance side deals with such matters as Finance, Computer and Administrative Services, Buildings and Plant, Real Estate and Planning. The employment relations of "non-teaching" personnel such as those in Local 1280's bargaining unit, are dealt with by a section of the Finance department. The Academic side has four departments: Elementary, Secondary, Curriculum and Special Services and Teacher Personnel. The Teacher Personnel department deals with employment matters on the Academic side, including the negotiation and administration of the collective agreement covering its 5600 to 5800 Bill 100 teachers, the collective agreement covering occasional teachers, the collective agreement with OPSEU and the agreement with CUPE covering full-time teacher aides. With respect to unorganized employees, the Teacher Personnel department is involved in the hiring and firing of Heritage Language instructors, ESL instructors, Citizenship instructors, Adult Literacy and Numeracy instructors, Summer School instructors and Itinerant Non-Academic Music instructors. The school principal deals at first instance with supervision and discipline of instructors employed in a school during the school day. For instructors in "centres", this function is exercised by an Instructor-in-charge who reports to a supervising principal with responsibility for three or four centres. In these matters, school principals report to a regional superintendent and supervising principals report to the superintendent in charge of the programme in which the instructor teaches. In the end, unresolved disciplinary matters involving any of these employees are dealt with by the Teacher Personnel department.

16. Although such employees do not "teach", the Teacher Personnel department also hires or is involved in the hiring of student supervisors, teacher aides and two librarians employed as resource persons at the respondent's administrative offices. The need for student supervisors arises at schools at which the school day has been extended to accommodate Heritage Language instruction. Not all pupils take such instruction. Those who do not must be supervised during the periods in which their classmates are receiving such instruction. Student supervisors perform that function. Some schools also employ student supervisors to supervise the lunchroom during the lunch hour. Student supervisors are employed for a maximum of 20 hours per week. They require no particular academic qualification. All of them are paid an hourly rate. Regular part-time teacher aides receive an appropriate percentage of the salary of full-time teacher aides and a range of benefits. Supply teacher aides are paid a daily rate and receive no benefits. Teacher aide salaries and daily rates are a function of qualifications.

17. The non-teaching personnel section of the respondent's Finance department hires or is involved in the hiring of swim instructors, change room attendants and first and second language monitors. The swim instructors attendants are involved in the provision of two consecutive 14-week periods of swimming instruction during the first six months of each calendar year. This is part of the respondent's Outdoor Education programme which is the responsibility of one of the assistant superintendents in the Curriculum and Special Services department. The hours of work of the instructors could vary from three hours per day to 25 hours per week. Change room attendants supervise the change rooms at premises where swim instruction is provided, during the times when the respondent rents premises for those purposes. Swim instructors and change room attendants

are paid (different) hourly rates, and neither group receives any additional benefits. First and second language monitors are university level language students whose employment by school boards is funded by a Federal Government programme. Their function in the respondent's schools is to "monitor" the teaching of the French language. They do no teaching themselves; indeed, it is a condition of the Federal Government funding that these monitors do not teach. The respondent's witness was hard pressed to say what they did do, other than sit and listen. He suggested they might assist with a field trip. First and second language monitors "work" six to eight hours per week.

III

18. As the Board observed in *Kidd Creek Mines Ltd.* [1984] OLRB Rep. March 481 at paragraph 50:

...the notion of an "appropriate" bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered....

The various and often competing considerations which the Board takes into account in making bargaining unit determinations have been described in a number of Board decisions. The following passage from *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, provides a useful review of those considerations:

13. The concept of a bargaining unit performs two quite distinct functions in labour relations law. In order to be certified, a trade union must enjoy the support of a majority of employees in a bargaining unit. The unit serves as an electoral district in this setting. After a union is certified, the bargaining unit found by the Board to be appropriate strongly influences the conduct of collective bargaining. Although the parties sometimes vary this unit description, it is frequently simply reproduced in the recognition clause in a collective agreement.

14. A trade union may experience unsurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers

may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differentials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited, supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been "hard pressed" not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point

involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

20. The creation of a viable bargaining structure is the only objective when employees have ready access to collective bargaining whatever the unit configuration - i.e. when a single large unit will not unduly impede organization. The Board has often been called upon to reconcile the claims of special interest groups with the considerations that favour a consolidated bargaining structure. There is a long-standing practice of segregating plant and office employees in separate units in recognition of their divergent interests. See *H Gray Limited*, 55 CLLC 18,011. But bargaining units consisting of employees in one particular classification or department are not generally considered by the Board to be appropriate because such small units entail excessive fragmentation. See *Corp. of the City of Barrie*, [1974] OLRB Rep. Nov. 813. And in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, paramedical personnel were included in the same hospital unit as professional staff. In that case, the Board said:

Rational solutions lie in the careful examination of evidence for significant differences in community of interest between occupational groupings bearing in mind the structural requirements for effective collective bargaining and labour relations. At the risk of being repetitive we think it important to observe that it is natural for certain group of employees to be apprehensive about the outcome of collective bargaining if their occupation does not dominate a bargaining unit in sheer numbers and seldom is the Board confronted with applications for certification affecting employees with identical interests, abilities and backgrounds. This, if the Board was to be preoccupied with these apprehensions an unmanageable proliferation of potentially ineffective bargaining units would be the likely result. Accordingly, the Board must concern itself with the only significant differences between employee interests and these significant differences must result in practical bargaining unit demarcations - practical in the sense that demarcations must provide efficient answers to like cases; there must be reasonable assurance that they can withstand the passage of time; and practical in the sense that sound collective bargaining relationships can be built upon them.

21. Can the interests of employees who perform the same work, but on different temporal basis, diverge sufficiently to require the certification of separate units? Full-time and part-time employees, who often perform the same tasks, are always separated because they do not share a community of interest. As was said in *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330, at paragraph 6:

This practice reflects the Board's view, supported by the extensive labour relations experience and knowledge of its members, that part-time employees and students, on the one hand, do not generally share a community of interest since the former are primarily concerned with maintaining a convenient work schedule which permits them to accommodate the other important aspects of their lives with their work and with obtaining short-term immediate improvements in remuneration rather than with obtaining life insurance, pension, disability, and other benefit plans' extensive seniority clauses; and other long-term benefits.

22. But the Board has consistently refused to segregate permanent employees from those employed on a casual or temporary basis. *Sydenham Hospital*, [1967] OLRB Rep. May 135; *Centre Gray General Hospital*, [1968] OLRB Rep. Mar. 1172; *United Counties of Northumberland Durham*, [1968] OLRB Rep. Dec. 915; *Oshawa General Hospital*, [1970] OLRB Rep. Jan. 1218; *Chappels Stores Ltd.*, [1970] OLRB Rep. June 313; *Board of Education of Borough of Scarborough*, [1975] OLRB Rep. Sept. 657; *Spramotor Ltd.*, [1976] OLRB Rep. 215; *Board of Education of Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713; and *Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273. (Only seasonal employees in the canning and tobacco industry have been excepted from this rule. See *Melner Manufacturing Ltd.*, [1969] OLRB Rep. Mar. 1288.) This has been the Board's policy even though the interests of these two groups of employees sometimes diverge. Consider two full-time employees, one hired for an indefinite term and the other engaged occasionally over a period of few months. The temporary/full-time employee is likely to want terms and conditions of employment differ-

ent than the permanent/full-time employee for much the same reasons as a part-time worker does. But some limit must be placed upon the number of bargaining units in order to avoid undue fragmentation. Another reason for not creating yet another unit for temporary employees is that one cannot always forecast whether an employee's term of employment will turn out to be temporary or permanent. An employee is often hired with a promise of work for a fixed term coupled with the possibility of continuing to work thereafter. In this setting, a person's bargaining objectives change slowly over time as he or she begins to perceive a permanent nexus with the employment relationship. Consequently, there is no neat division between employees who see themselves as temporary and those whose self-perception has a permanent hue.

19. The Board's practice of separating full and part-time workers into separate bargaining units was discussed at length in *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713, where the Board considered the appropriateness of excluding either "persons regularly employed for not more than 24 hours per week" or "persons employed on a casual and temporary basis" from a unit of "clerical, technical employees, teacher aides and cafeteria aides":

10. It was the respondent's submission that on the evidence presented the Board should find a community of interest between the full-time and permanent part-time employees and that the Board's usual approach to employees so employed ought not to prevail. Counsel submitted that the Board's usual separation of part-time and full-time employees was based on employment relations in an industrial context and had no application to the white collar office setting of the respondent. On the other hand, the respondent submitted that casual or temporary employees had no community of interest with full-time staff and ought to be excluded from any appropriate bargaining unit.... The applicant union, on the other hand, submitted that it had relied on the Board's usual practice in organizing the respondent's employees and that, in any event, the facts before the Board were not exceptional and deserving of special treatment.

11. The Board recently dealt with a similar request to review its bargaining unit configuration policy on part-time and full-time employees in *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330. The board outlined the purpose of its usual approach in these kinds of cases in the following terms:

The Board's general practice concerning exclusion of part-time employees and students from full-time bargaining units is set forth in *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. Mar. 324. (See also *The Post Printing Company Ltd., a division of Thomson Newspapers Limited (Leamington)*, [1966] OLRB Rep. Mar. 930; *Premier Plastics Limited*, [1969] OLRB rep. July 508; *Wilson-Monroe Company Ltd.*, [1973] OLRB Rep. Dec. 647; and *The Beacon Herald of Stratford Limited*, [1975] OLRB Rep. Feb. 103.) This practice reflects the Board's view, supported by the extensive labour relations experience and knowledge of its members, that part-time employees and students, on the one hand, and full-time employees, on the other hand, do not generally share a community of interest since the former are primarily concerned with maintaining a convenient work schedule which permits them to accommodate the other important aspects of their lives with their work and with obtaining short-term immediate improvements in remuneration rather than with obtaining life insurance, pension, disability, and other benefit plans; extensive seniority clauses; and other long-term benefits. See, for example, *Leon's Furniture Limited*, [1976] OLRB Rep. May 232, paragraph 5, in which the Board stated:

"... we have learned through experience in such applications that part-time employees do not share a community of interest with full-time employees in many aspects of the collective bargaining scenario. More precisely part-time employees are more pragmatically concerned with immediate as opposed to long-term benefits with respect to improving their terms and conditions of employment. In applying this proposition to more practical issues the part-time employee usually prefers to sacrifice long-term pension, medical and other welfare benefits for a more substantial increase in wages or a longer vacation period. The nature of seniority provisions contained in a collective agreement with respect to promotions, transfer and lay-offs does not always assume the same degree of significance to the part-

time employees as it would to the full-time employee. In other words, the Board has discerned a natural, inevitable schism in measuring the community of interest between the two categories of employees that invite separation into peculiar bargaining units ...”

For the foregoing reasons, part-time employees and students generally tend to have less initial interest in collective bargaining. Moreover, since the union organizing campaign may give rise to considerable uncertainty and apprehension among part-time employees and students with respect to the continued accommodation of their particular needs and desires for a convenient work schedule and maximum short-term remuneration, they are prone to oppose applications for certification. Such opposition could preclude full-time employees from engaging in collective bargaining if the Board generally exercised its discretion under section 6(1) of the Act in favour of bargaining units which included not only full-time employees but also part-time employees and students. Accordingly, the Board’s practice concerning part-time employees and students is not only a policy designed to avoid difficulties which may arise where groups with separate communities of interest are included in a single bargaining unit but is also an organizing rule which promotes public interest, identified in the preamble of *The Labour Relations Act*, in furthering harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

12. We are of the view that the case before us presents much less compelling evidence for the requested inclusion of the so-called permanent part-time employees than existed in the *Toronto Airport Hilton* case. The employees in question work precisely one-half the hours of full-time employees and this fact is usually the critical advantage flowing to those employees attracted to part-time work. It is this reality that allows them to accommodate the other important aspects of their lives in a much more substantial way than full-time employment allows. For example, a 1976 study revealed that key reasons given for working part-time included: “going to school”, “personal or family responsibilities” and “not wanted to work ‘full-time’.” See Robertson, *Part-time Work in Ontario: 1966 to 1976*, Research Branch, Ontario Ministry of Labour, August 1976, Study No. 20, page 18. The fact that part-time employees perform the same work under the same conditions as full-time employees and the fact that their terms and conditions of employment are similar are not unusual facts in pre-collective bargaining employment patterns and pale in comparison to respective attachments to the work place of full and part-time employees. As the panel in *Toronto Airport Hilton*, *supra*, indicated, it is this Board’s experience that part-time employees have less initial interest in collective bargaining than do full-time employees because of the aforementioned attraction of part-time work. Indeed, it is our opinion that collective bargaining would have been impeded for entire industries had this Board taken any other view. It is uninstrutive to point to situations where parties are not providing for part-time and full-time employees in one collective agreement (and even here many qualifications have to be inserted). This is the end result of collective bargaining, after a relationship has matured and after the parties have come to an understanding over the proper balance of full-time to part-time work. In fact, without such an understanding, full-time and part-time employees may come into dramatic opposition should an employer decide to rely more heavily on part-time employees for reasons of economy and/or administrative efficiency. Finally, it is important to stress that none of the above deprives part-time employees of collective bargaining. Our approach responds only to the appropriateness of any bargaining unit where a party asks the Board to require their inclusion with regular full-time employees.

13. In the facts at hand the respondent points to the common terms of employment as evidence of a community justifying one bargaining unit. As noted above, these factors do not go to the different appetites for collective bargaining exhibited by these two distinct groups of employees regardless of industry. Moreover, such factors are often the product of unilateral employer action and, thus, unreliable indicators of employee interests. There is no indication that the respondent provided similar conditions of employment in response to employee demands or marketplace pressures. The interchange between full-time and part-time employment in evidence before us is also not unusual and is a phenomenon that can be accommodated by the collective bargaining process. This is not a case where there is no identifiable group of employees hired to work part-time as in *Paris Poultry Products Limited*, [1978] OLRB Rep. May 453; *Canadian*

Pacific Railway Company, *Royal York Hotel Case*, [1960] OLRB Rep. May 1960; and in the construction industry. On the related issue of casual or temporary employees, our practice has been against making distinctions between permanent and temporary employees. See *Sydenham District Hospital*, [1967] OLRB Rep. May 135 at page 137. In a volatile economy, such distinctions can become quite illusory. We have found that many work forces can be characterized at the margin as more or less temporary. See *Laing & Sons Limited*, [1961] OLRB Rep. Dec. 279; *Peter Austin Manufacturing Co.*, [1967] OLRB Rep. May 144; *Universal Cooler*, [1967] OLRB Rep. Sept. 546. However, employees employed on a truly "seasonal" basis may well merit a separate unit depending on when the application is brought. See *Melnor Manufacturing Ltd.*, [1969] OLRB Rep. Mar. 1288. But in the facts at hand this rule or approach has no application. Accordingly, casual or temporary employees employed in full-time capacity on the date of application are to be included in the bargaining unit and part-time employees, whether permanent or casual, are to be excluded.

14. However, all of the foregoing should not prevent the Board from reviewing whether the twenty-four hour standard ought to be revised downward to at least twenty (20) hours in light of the changes in employment patterns that have occurred over the years. The current twenty-four hour standard is a longstanding policy whose origin probably dates back to the War Labour Board years (see *Snyders Ltd.*, (1946), 46 CLLC 16,457; *Davis Leather Co. Ltd.*, (1947), 47 CLLC 16,491; and *T.A. Collins Transport Ltd.*, [1966] OLRB Rep. Oct. 504). Unfortunately, such a review is not practical in the context of a particular case because of the related amendments to the Board's forms that would be necessary (see Form 3-O. Reg. 32/73, s.8; Form 4 - R.R.O. 1970, Reg. 551, as amended by O. Reg. 474/71; Form 17 - O.Reg. 321/73, s. 10; and Form 51 - R.R.O. 1970, Reg. 551, as amended by O. Reg. 474/71). There would also be the problem of the operative date of any change.

Whatever it might entail, the kind of review contemplated by the panel in the last paragraph of this passage has not taken place.

20. In *The Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900, ("the *Toronto Board* case"), a differently constituted panel of the Board considered whether a unit of instructors employed to teach ESL courses in its adult and continuing education programme was an appropriate unit of employees of the respondent Board of Education for the City of Toronto ("the *Toronto Board*"). In its decision, the Board quoted extensively from a number of Board decisions, including the one in *Board Governors of Ryerson Polytechnical Institute*, *supra*. It reiterated the Board's aversion to "job classification" or "departmental" units at paragraph 24:

24. Finally, for the purpose of completeness, we should reiterate the Board's traditional and continued reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmented bargaining which that creates (see, for examples: *Cryovac Division, W. R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Rosco Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry, where departmental unionization has existed in the extreme, the Board indicated in 1981 that it might reverse the entrenched organizing patterns of the past, in favour of broader-based bargaining (see *Hamilton Spectator*, [1981] OLRB Rep. Aug. 1177). Most recently, in *T. Eaton Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board repeated once again that it would not be conducive to orderly and stable collective bargaining to divide up an employer's business into bargaining units based on departments....

The Board had this to say about the community of interest of ESL instructors employed by the Toronto Board:

25. There is no doubt that ESL instructors teach courses that are somewhat different from those taught by other instructors (although not so obviously different from other language instructors). But that is not a sufficient basis for concluding that they should be regarded as a separate unit for collective bargaining purposes. They are not certified teachers and do not require any specialized accreditation in order to teach their courses; nor is it apparent that they have any

distinct or unusual teaching skills which are manifestly different from those of other continuing education instructors. The nature of their work - teaching - is very much the same, and they share the same working conditions and terms and conditions of employment. All continuing education instructors in non-credit courses receive the same salary and benefits and work in a variety of locations during the day, evening, or on weekends.

26. There is no significant difference in the structure of supervision. In a school setting, a principal or vice-principal has overall responsibility and in a non-school setting it is a lead teacher who, interestingly enough, need not have any particular training in ESL. ESL is an integrated and important part of the respondent's overall continuing education programme which is linked to the curriculum planning resources of the language study centre in the same way as other course are, and in the same way as other courses may draw upon the resources of the mathematics, modern languages, or other departments. ESL is not a separate department or administrative subdivision within the respondent's organization, and even if it was, that would not in itself justify a separate unit for collective bargaining purposes any more than a departmental bargaining unit would be appropriate in a factory, hospital or municipal corporation. If ESL teachers form an appropriate bargaining unit, so would the teachers of heritage languages, French as a second language, accounting, or automechanics. In each case the instructors teach a distinct course with a definable and different subject matter requiring some specialized knowledge or training. If the union is right in its analysis, the spectre of a multiplicity (perhaps dozens) of new bargaining units is an entirely plausible one and would only exacerbate the present situation in which there are already a very large number of bargaining units.

With respect to the organizational concerns described in the *Ryerson* case, the Board was not persuaded that a unit which encompassed at least all instructors in the Toronto Board's continuing education programme could not be organized successfully "or that to facilitate employee access to collective bargaining it is necessary to define the bargaining unit in terms of the subject matter which instructors teach." The Board concluded that a unit confined to instructors teaching non-credit ESL courses was not appropriate for collective bargaining.

IV

21. The decision in the *Toronto Board* case was released after we had heard the parties' argument in this matter. We asked the Registrar to forward copies of that decision to counsel and invite their written submissions with respect to its application in this case. Taking those latter submissions into account, the parties' submissions may be briefly stated.

22. CUPE argues that instructors in the extended day heritage Language programme have a distinct and separate community of interest from the other Heritage Language instructors, having regard to their different terms and conditions of employment and their commitment to a full-time job. It relies on the Board's practice of putting full-time and part-time workers in separate bargaining units, and argues that a failure to do so in this case would make Heritage Language instructors an impossibly large and diverse group to organize and thereby deny extended day Heritage Language instructors the opportunity of bargaining collectively. It says the numbers of extended day Heritage Language instructors are sufficient to make them a viable unit, and that the other unorganized full-time workers could in future be included in a "tag-end", full-time unit." It distinguishes the result in the *Toronto Board* case on two grounds: that the terms and conditions of employment of the Heritage Language instructors in this case "differ dramatically" from those of the ESL instructors in the *Toronto Board* case and that in this case "there is clearly a separate department for Heritage Language." It notes that separation of full and part-time workers was not addressed in the *Toronto Board* case. If a unit of extended day or full-time Heritage Language instructors is not appropriate, CUPE submits that a unit of full-time instructors would be appropriate, again justifying the exclusion of part-time instructors by reference to the Board's practice of placing full-time and part-time employees in separate bargaining units. It contends for the traditional 24 hour per week line of demarcation or, if that seems inappropriate here, argues for an 18

hour per week line on the basis that 24 is 60 per cent of 40, the number of hours in the traditional full-time industrial work week, and 18 is the 60 per cent of 30, the number of hours in a full-time work week for Heritage Language instructors.

23. The respondent school board is content with a unit of Heritage Language instructors provided the unit contains all such instructors (in which event, it is apparent to all, this application would fail). It suggests that concerns about fragmentation should not be as strong in this case as in the Toronto Board case because it has considerably fewer existing collective bargaining relationships than the Toronto Board did in that case. The respondent strongly resists any separation of full and part-time workers. With respect to Heritage Language instructors, it relies on the fact that they all perform the same work for the same sort of student, are all hired by the Teacher Personnel department and all have matters of discipline ultimately handled by that department. The respondent says the unit here is analogous with a craft unit, and notes that the Board does not exclude part-time tradesmen from craft units, citing *Premier Operating Corporation*, [1983] OLRB Rep. Dec. 2066. It notes also that only one of the six collective agreements by which it is currently bound excludes part-time workers, and that there was no suggestion in the *Toronto Board* case that part-timers would be excluded from any unit of continuing education instructors. With respect to its ESL instructors and other unorganized workers, the respondent says a distinction based on hours of work over and under 24 per week makes no sense, when ESL instructors, for example, work no more than 25 hours per week.

V

24. “Teachers”, as that term was defined from time to time in predecessors of the *Teaching Profession Act*, and, later, in Bill 100, have been expressly excluded from this Board’s jurisdiction since at least 1950. (For a review of the relevant statutes and their history, see *Board of Education for the City of York, supra*, at paragraphs 7 to 22.) Collective bargaining between teacher organizations and school boards was not regulated by any Ontario statute until 1975, when Bill 100 was enacted. Bill 100 itself determined both the scope of the bargaining units and the identity of the bargaining agent for such units. Two groups of persons employed by school boards to teach were excluded from coverage by Bill 100. One group consists of certified teachers employed as “occasional teachers” as that term is defined by paragraph 1(1)31 of the *Education Act*. The other, referred to here as “instructors”, consists of those persons whom school boards are permitted to and do employ to teach even though they are not certified teachers. (On its face, the definition of “teacher” in Bill 100 includes an uncertified person teaching under the authority of a letter of permission, but only if he or she is employed under a written contract in the form prescribed for permanent and probationary qualified teachers. The latter circumstance seems unlikely enough. When one adds the further qualification, implicit in section 5 of Bill 100, that this hypothetical individual must also somehow be a member of an affiliate of the Ontario Teachers’ Federation, the actual inclusion of an uncertified teacher in a Bill 100 unit seems so improbable, if not impossible, that one can fairly say that all instructors are excluded from Bill 100.) Because they are excluded from Bill 100, collective bargaining for instructors and occasional teachers falls, by default, within this Board’s jurisdiction under the *Labour Relations Act*. While this has been so for some time, it is not until relatively recently that the Board has had to deal with applications for certification involving either group.

25. The first occasion on which this Board had to consider the applicability of its general practices, procedures and doctrines to a certification application affecting occasional teachers was in *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Mar. 466. One of the issues in that case was whether the Board would apply its “30-30” rule to determine which persons were “employed” in the occasional teacher bargaining unit at relevant times. It concluded it would. The Board rejected that conclusion and adopted a special test for occasional teachers in *Board of Edu-*

cation for the City of York, [1985] OLRB Rep. May 767, which was the next decision to address that question. As will be apparent from that decision and from the passage quoted earlier from *Board of Education for the Borough of Scarborough*, *supra*, occasional teachers are not a group which would have been excluded from a unit of certified teachers if it had fallen to this Board to define such a unit in accordance with the principles it has developed over the years. This observation is not made as part of a critique of Bill 100, but simply to highlight a fact peculiar to the "education industry", the ramifications of which have led the Board to adopt a different approach to matters involving occasional teachers. In the same vein, it is noteworthy that the Board's approach to appropriate composition of occasional teacher bargaining units has been so influenced by the peculiarities of Bill 100 as to have results which would not occur in another industry - such as the definition of units in terms of the language in which employees work, for example: see, *Le Conseil Scolaire d'Ottawa*, [1985] OLRB Rep. July 1090.

26. The June 1986 decision in the *Toronto Board* case is the first occasion on which the Board has dealt with any issue affecting the appropriate definition or composition of a unit of instructors. It did not consider the application of the Board's practice, in industries organized otherwise than on a craft basis, of defining separate units for full and part-time workers when asked to do so. It said nothing about the hours of work of the affected employees, except in paragraph 14 where it described the jobs in question as "essentially part-time work opportunities." The propriety of applying that practice in defining units of instructors in the education industry is a question of first impression in the case before us. The Board has no substantial experience with collective bargaining between school boards and instructors, nor are we aware that anyone has. This is no reason to ignore the Board's experience in other areas or the fundamental principles it has developed through and as a result of that experience, of course. Given the experience that Board has had with issues involving occasional teachers and, to a lesser extent, its experience with university collective bargaining, however, we would not be quick to suppose that rules-of-thumb and presumptions of fact derived from the application of basic principles to experience acquired in other spheres will necessarily bear unmodified, or any, application here.

27. Setting aside for a moment the question whether any separation based on hours of work is warranted, we have concluded, as the panel in the *Toronto Board* case did, that a bargaining unit limited to instructors who teach a particular subject - Heritage Language, in this case - is not an appropriate bargaining unit. We adopt the reasons expressed in the passages quoted from the *Toronto Board* decision in paragraph 20 above. We are not satisfied that the factual distinctions between that case and this are significant with respect to this issue. Indulging briefly in the use of the word "teacher" in its ordinary meaning, it appears to us that as teachers, albeit teachers without the qualifications which would take them into the collective bargaining regime of Bill 100, Heritage Language instructors share a sufficient community of interest with other such teachers that they should all be "lumped together for the purposes of collective bargaining", regardless of subject taught. In this case, we take that conclusion beyond those to whose classes the "continuing education" label has been applied, and include both Itinerant Non-Academic Music Instructors and Swim Instructors. While the interests of the Swim Instructors may seem likely to be different from those of instructors in more academic or intellectual subjects, it is hard to see that their interests are as close or closer to those of any of the unorganized groups of non-instructors. Furthermore, we do not wish to offer any encouragement to debate about the relative seriousness or academic worthiness of the course content of the diverse classes being taught by employees of school boards and other educational institutions. On the other hand, we see no particular reason to include in a unit of instructors any or all of those unorganized employees who do not teach. The mere existence of Bill 100 is sufficient support for the proposition that it is no less reasonable in school board labour relations than in the university context to put those who teach and those who do not in separate units.

28. Turning to the union's request for exclusion from the bargaining unit of part-time employees in accordance with Board practice, we think it important to distinguish between the 24 hour "rule" and the principles and educated expectations on which it depends for its origin and continued justification. The principles are simply the community of interest principles described in the cases to which we have referred. The educated expectation is that "employees who work substantially fewer hours than full-time employees do not generally share a community of interest with the latter group": *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Mar. 466 at paragraph 20; *Elizabeth Fry Society of Ottawa*, [1985] OLRB Rep. July 1026 at paragraph 23. Separating the two groups requires line drawing. As the Board noted in *Board of Education for the Borough of Scarborough*, *supra*, at paragraphs 12 and 14, the qualitative "substantially fewer" test translated into a quantitative "one-half" one which, forty years ago, came to 24 hours per week. The 24 hour line survived gradual reduction of the standard industrial work week to 40 hours, since it was still possible to say, in the cases in which the Board was called upon to re-examine the concept, that the difference between 24 hours per week and full-time employment was still sufficiently substantial that the important interest of the Board and the parties who appear before it in maintaining certainty and predictability outweighed any interest which might have been served by tinkering with the number, whether out of mathematical faithfulness to the original ratio or for any other reason.

29. On the facts before us, we see no reason to abandon the Board's educated expectation that employees who work substantially fewer hours per week than full-time employees are unlikely to share a community of interest with the latter group. Even in this new field of organizing, the important interest of the Board and the parties who appear before it in maintaining certainty and predictability requires at least that the onus of justifying abandonment of that educated expectation be on the party proposing it. The respondent has not discharged that onus. We have no difficulty imagining that the bargaining aspirations and interest in collective bargaining of someone employed to teach one 2-1/2 hour class per week will be different from those of someone employed to teach 30 hours per week. We do, however, have difficulty saying that someone working 24 hours per week is working "substantially fewer" hours than the 30 hour per week employee. This is not just because of the semantic incongruity of a statement that 80% is substantially less than 100% but, more importantly, because we find it terribly difficult to see why, on the facts before us, the 80% contract extended day Heritage Language instructor should be said to share a greater community of interest with the 2-1/2 hour per week Saturday instructor than with the full-time extended day Heritage Language instructor. Because this is a new area of organizing in an industry in which it might reasonably be expected that the applicability of customary Board practices would be freshly examined, it does not seem to us inappropriate to determine a dividing line which seems to us appropriate on the facts of the case before us, without feeling shackled to the 24 hour line. In doing so, we make no suggestion that the 24 hour per week line should be reconsidered on a case by case basis in industries in which there is already an established history of its application. Equally, we do not suggest or expect that our first look at this question in this new context will immediately and irrevocably set the pattern for bargaining unit determinations in the organizing of instructors employed by school boards.

30. Where, then, should the line be drawn if, as we have decided, it will not be drawn at 24 hours per week? Counsel for the applicant suggested 18 hours per week, because 18 is the same percentage of 30 as 24 is of 40. Counsel for the respondent suggested 15 hours, because 15 is one-half of 30, and then noted that even that number made little sense when applied to the other instructors whom, he appreciated, the Board might include in the appropriate unit. We are not attracted to a mathematical proportionality approach.

31. As indicated by the passage quoted from *Board of Education for the Borough of*

Scarborough, supra, full- and part-time workers have been distinguished in other contexts by perceived differences in their attachment to the workplace and in the strength of their aspiration for long-term gains in benefits, like pension benefits, in a trade-off against short-term gains in wages and other forms of immediate compensation. Because of the difficulties and problems they have or expect they would have in apportioning long-term benefits among "part-time" workers, employers tend to resist providing pension and other such benefits for those of their workers whom they perceive to have the stereotypical part-timers' limited attachment to their workplace. Simply put, an employee who conforms to the part-time stereotype on which the Board's distinction is based is unlikely either to seek or receive the same or proportionally similar pension benefits as an employee with a perceived 'full-time' commitment to the workplace. From that perspective, it is significant here that such benefits are provided to itinerant Non-Academic Music instructors who work more than 14 hours per week and to extended day Heritage Language instructors employed on percentage contracts for as few as 12 hours per week. Instructors who work Saturdays or evenings only are the most likely to fit the stereotype of the "moonlighter" whose interests differ from the employee whose primary career orientation is toward this workplace. As a matter of logistics, those who work in the evenings only or just on Saturday will not be working more than 8 hours per week for this employer. Although the evidence does not tell us the precise hours of work of every potential bargaining unit employee (which information the respondent was quite reluctant, for tactical reasons, to disclose to the union), we have a sense that there are two clusters of normal work hours, one ranging from 2 to 8 (and heavily weighted toward 2-1/2 by the many Saturday Heritage Language teachers) and another ranging from 12 to 30 (with a significant number at or above 24). Without suggesting that these observations demonstrably compel our conclusion, they have nevertheless led us to draw the line here at 10 hours per week.

32. In the result, we find that the appropriate bargaining unit consists of:

all instructors employed by the respondent, save and except supervisors and persons above that rank, persons regularly employed for not more than 10 hours per week and employees in any bargaining unit for which a trade union held bargaining rights as of October 2, 1985.

"Instructors" means persons employed to teach, regardless of subject or skill taught, the age of the pupil or the location at which the teaching takes place. This unit does not include any person who is a "teacher" within the meaning of paragraph 1(1) 66 of the *Education Act*, as such persons fall either within a unit of occasional teachers or a unit of teachers governed by *The School Board and Teachers Collective Negotiations Act*.

33. The respondent is directed to prepare and deliver to the Board and the applicant trade union lists of the names of persons it employed in the aforesaid bargaining unit on October 2, 1985, distinguishing in the usual manner between those who were at work on that day and those who were not and, with respect to the latter, indicating the last day worked before and the first day worked after October 2, 1985, and the reason for the employee's absence between those dates. In addition, the respondent is directed to provide the Board with specimens of the signatures of all employees named on the aforesaid lists for whom specimen signatures have not previously been filed by it in this application. The deadline for compliance with these directions is three weeks after the date of release of this decision or one week prior to the next scheduled hearing date, whichever is earlier.

34. The Registrar is directed to relist this matter for hearing.

1013-86-R and others on Schedules "A" and "B" etc. Retail, Wholesale and Department Store Union - Local 414, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as **Mr. Grocer**, Domgroup Ltd., Hollinger Inc., Conrad Black, and all respondents listed on Schedule "A", Respondents; Termarg Food Services Limited, Stalba Enterprises Inc., Carma Groceries (Ontario) Inc., 548082 Ontario Limited, 568429 Ontario Limited, Ron Nelson's Foods Ltd., Jorfy Foods Inc., Read-Wentworth Markets Ltd., Stroudal Marketing Ltd., 571726 Ontario Inc., W & J Holdings Limited, R.G.T. Marketing Limited, Stonegate Marketing Ltd., Kerland Foods Ltd, 578588 Ontario Inc., 580265 Ontario Limited, 580266 Ontario Limited, Jules Foods Limited, 579679 Ontario Inc., Lars Persson Active Marketing Inc., Challis Groceries Limited, Applicants, v. Retail, Wholesale and Department Store Union - Local 414, AFL-CIO-CLC, Respondent; Retail, Wholesale and Department Store Union - Local 414, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, and all respondents listed on Schedule "C", Respondents; Retail, Wholesale and Department Store Union - Local 545, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, 510688 Ontario Limited and Claude Brunet, Respondents; Retail, Wholesale and Department Store Union - Local 545, AFL-CIO-CLC, Complainant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, 510688 Ontario Limited and Claude Brunet, Respondents; Retail, Wholesale and Department Store Union - Local 579, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, 510647 Ontario Limited, Saul Kansala, Janet Kansala, 510662 Ontario Inc., Romeo Sauve and Diane Sauve, Respondents; Retail, Wholesale and Department Store Union - Local 579, Applicant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, 510647 Ontario Limited, Saul Kansala, Janet Kansala, 510662 Ontario Inc., Romeo Sauve and Diane Sauve, Respondents; Dave Kusluski and Carole Hull, Applicants, v. Retail, Wholesale and Department Store Union - Local 414, Respondent; Steve Borzush and Leslie MacLean, Applicants, v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, Respondent; Margaret Forma and John McKenzie, Applicants, v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, Respondent; Joyce Valliere and William Ariss, Applicants, v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, Respondent; Chris Billyard, Applicant, v. Retail, Wholesale and Department Store Union, Local 414, Respondent; Jeffrey Sywyk, Applicant, v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, Respondent

Parties - Practice and Procedure - Service requirements in Practice Note 5 relaxed due to number of parties involved - Board practice for amending application or complaint to add a respondent set out

BEFORE: *Owen V. Gray*, Vice-Chairman and Board Members *F. C. Burnet* and *R. R. Montague*.

APPEARANCES:

James Hayes, James Carpick, Robert McKay and *D. G. Collins* for Retail Wholesale and Department Store Union, Locals 414, 545 and 579.

Richard Nixon for Bo-Ma Co. Ltd., *Charles Cornelius Postma*, 590105 Ontario Limited, *Frank Dam*, *Theodorea Margaret Dam*, *Robert D. Bell Investments Inc.*, *Robert Donald Bell*, *Corine Kay Bell*, 607099 Ontario Inc., *Roger Percy Hein*, *Ellen Betty Hein*, 597077 Ontario Inc., *Ronald Stothers*, 580265 Ontario Limited, *Joseph John Dilello*, *Nicholas Anthony Giannini*, *Alexander Kilfin*, 580266 Ontario Limited, *Richard Petelka*, *Anthony Russo*, 579679 Ontario Inc., *Garnet James Reid*, *William Francis Deschamps*, *C & J Maurice Family Holdings Inc.*, *Conrad P. Maurice*, *Joan Maurice*, *Stroudal Marketing Ltd.*, *Edward James Stroud*, *Alain Pierre Lebrun*, *Levon's Groceries Inc.*, *Michael Vincent Levon*, 597060 Ontario Inc., *Michael Sciarra*, *Joseph Finella*, *David Sciarra*, *Peter John Jurmain*, 568429 Ontario Ltd., *David Joseph Robert*, *Larry Howard Deschamps*, 659651 Ontario Limited, *Graham Arnold*, *W & J Holdings Limited*, *Wesley Victor Spurrell*, *Myrtle Joy Spurrell*, *Termarg Food Services Limited*, *Terence Joseph Nicol*, *Stonegate Marketing Limited*, *Egon Pototschnik*, 659484 Ontario Limited, *Andrew Morris McLennan*, *Gerald Edward Michael Finley*, *G. E. Shaw Foods Limited*, *George E. Shaw*, 578588 Ontario Inc., *Anthony Zezza*, *Rosina Zezza*, *Anthony Pietro Reda*, *Susan Elizabeth Reda*, *Mijon Foods Inc.*, *Maurice Vivion D'Arcy*, *Rosalind Frances D'Arcy*, *Gatestone Marketing Limited*, *Robert Ahearn*, 651423 Ontario Limited, *Angelo Vento*, *George Jovanovich*, *Richard Weiditch*, *R.G.T. Marketing Limited*, *Gerald Russell Taylor*, *Herbert Russell Taylor*, *Samkeiken Foods Inc.*, *William John Shudlock*, 657041 Ontario Inc., *Frank Balsamo*, *Brian Shewell*, *Ed Poirier Foods Limited*, *Edward Poirier*, *M & T Grocers Ltd.*, *Michael Santeramo*, *Annette Santeramo*, *C.G. McMullen Grocers Ltd.*, *James B & E Morris Family Enterprises Inc.*, *Robert James Morris*, *Donna Marie Morris*, 660401 Ontario Inc., *Mark Dzugan*, *Challis Groceries Limited*, *Larry E. Challis*, *Diane Challis*, 510688 Ontario Limited, *Claude Brunet*, 510647 Ontario Limited, *Saul Kansala*, *Janet Kansala*, 510662 Ontario Inc., *Romeo Sauve*, *Diane Sauve* and 650287 Ontario Limited.

James E. Bowden for 587266 Ontario Limited, *William R. Anderson*, *Marianne Anderson*, *John S. Manderson*, *Dianne Manderson*, *Jofry Foods Inc.*, *Doris Gyorffy*, *Robert Gyorffy*, *Robert Moulder*, *Ron Nelson's Foods Ltd.*, *Ronald John Nelson*, *Stalba Enterprises Inc.*, *Steven Alfred Bartley*, *Carma Groceries (Ontario) Inc.*, *Roger Black*, *Jules Foods Limited*, *Josef Jan Robert Gwiazda*, *Julie Ann Gwiazda*.

Colin D. McKinnon for 548082 Ontario Limited, *David Stephen Lockett*, *Betty Ruthe Lockett*, *Karsmor Limited*, *William Aldrich*, *Elsie M. Aldrich*, *Thomas Morrow*, *GGW Enterprises Ltd.*, *Rico Gelano*, *Linda Gelano*, *Frank Winkel*, *Wingil Foods Enterprises Ltd.*, *Petcol Foods Limited*, *Peter LaRose*, *Colleen McGee*, 125913 Canada Inc., *Herbert Willar*, *T. H. Sims*, 652668 Ontario Inc., *Gani Vata*.

C. E. Humphrey and *Martin Rosenbaum* for *Read-Wentworth Markets Ltd.*, *Michael Read*, *Susan M. Read*, *Dennis Read*, *Elizabeth Read* and for *Anthony Crossley*.

R. C. Filion for *Willett Foods Limited* and *Domgroup Ltd.*

Wm. R. Patchett for 599872 Ontario Inc., *William Reginald Patchett*, 370801 Ontario Limited, *Delphine Patchett*, *William Patchett Jr.*, 653862 Ontario Inc.

R. A. Spence for *C. M. Black*.

R. P. Armstrong and *P. D. Jackson* for *Hollinger Inc.*

Wm. S. Challis for *Dave Kusluski*, *Carol Hull*, *Steve Borzuch*, *Leslie MacLean*, *Margaret Forma*, *John MacKenzie*, *Joyce Valliere*, *William Ariss*, *Jeffrey Sywyk*.

Barb Walter for *Pannell Kerr Forester Inc.*, trustee in bankruptcy of *Kerland Foods Ltd.*

No one appearing for *Ronald John Boan*, *J. & L. Hayden Enterprises Ltd.*, *Jack Hayden*, *Lillian Hayden*, *Lars Persson Active Marketing Inc.*, *Lars Persson*, *Iris Persson*, *Kerland Foods Ltd.*,

John D. Kerr, Joan N. Rowland, 134805 Canada Inc., Lawrence Henry Taylor, J. E. Taylor, Ronald J. Hannah Holding Co. Ltd., Ronald J. Hannah, Antonio Agozzino, Bob Jackson Foods Ltd., Robert Jackson, Wayne Allen Hamilton, 571726 Ontario Inc., James Roland Grandy, Carl George McMullen, Nicholas Anthony Giannini, Joseph John Dilello.

DECISION OF THE BOARD; September 30, 1986

[Various procedural matters not included: Editor]

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2. At the hearings of August 12-14, 1986, we drew the attention of the parties to Practice Note 5, as amended effective November 1, 1985 (see [1985] OLRB Reports, May), which includes the following requirements:

5. Notwithstanding paragraphs 1 to 4, unless the Board otherwise specifically directs, *after the first scheduled hearing date in the proceeding it is the responsibility of a party or participant who files any document or correspondence with the Board to serve a copy of the document or correspondence on all those entitled to notice. Any such document or correspondence so filed with the Board must be accompanied by a statement that the party filing it has effected the service required by this paragraph.*

6. The service requirements contained in paragraph 5 above shall not apply where the document or correspondence discloses whether a person is or is not a member of a trade union or does not desire to be represented by a trade union.

7. Should any dispute arise over service of documents or correspondence referred to in paragraph 5, the onus of proving service shall lie upon the party or participant seeking to rely on the said document or correspondence.

8. If documents or correspondence are not served as required herein, the Board may refuse to consider such documents or correspondence, or may consider them on such terms or conditions as it deems appropriate.

[emphasis added]

Having regard to the number of services Practice Note 5 would ordinarily require in this case (there being nearly two hundred parties), we ruled that service of a document or correspondence in these proceedings on any party represented by counsel or an agent will be sufficient if a copy of the document or correspondence is delivered to the party's agent or counsel. We also ruled that if an agent or counsel ceases to represent a party, he or she is obliged to forthwith advise the Board and all other parties of that fact and of the last known address of the party he or she has ceased to represent. All counsel and representatives must be copied with correspondence sent to the Board. Such correspondence should indicate on its face the persons to whom it has been copied and must, in any event, contain or be accompanied by the statement required by paragraph 5 of Practice Note 5.

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5. During the Board's hearings on August 12th it became apparent that, as of the terminal date for the applications filed in July, Mr. Grocer franchises at some locations covered by applications filed by RWDSU Local 414 were being operated by persons not named as respondents in those applications. With respect to one of those locations, counsel for Local 414 has since written to the Registrar as follows:

Re: R.W.D.S.U.- Mr. Grocer, OLRB File Nos. 1100-86-R, 1101-86-R, 1102-86-U (94 Beckwith Street North, Smith Falls)

We are now advised that the Mr. Grocer franchise at this location is operated by one Michael Hornby.

We request that Mr Hornby be added as a respondent to the above-noted matters.

As this letter does not indicate what other allegations, if any, would be made about Mr. Hornby, nor what relief is sought against him, the Board is at this point unable to give Mr. Hornby (and the present parties) notice of the case he (and they) may be called upon to meet with respect to his operation of the Mr. Grocer franchise in Smith's Falls.

6. The Board's Rules of Procedure do not prescribe a procedure for amending an application or complaint to add a respondent. Section 86 of the Rules of Procedure provides:

86. Procedure not prescribed is governed by analogy to these Rules.

The object of any procedure concerned with amending an application or complaint to add a respondent must be the same as that of the procedure which deals with initiating an application or complaint against a respondent: to ensure that the Board, the existing parties and the added respondent receive at least the information required by the Forms prescribed by the Board's Rules of Procedure for use in the subject proceedings. Having regard to the complexities of this case, an application by any of the trade union parties to add a respondent or respondents should include copies of each of the pages of its filings to date which would be amended by the naming of and setting out of allegations against the proposed respondent(s), with the amendments noted thereon in a manner which enables the reader to differentiate them from the original text, under cover of a letter indicating the name and address for service of each proposed respondent and the franchise location(s) in which the respondent is alleged to have (or to have had) an interest or role. Copies of any such letter and enclosure(s) should be served by the applicant/complainant on all parties presently entitled to notice of its consolidated applications and complaints, in accordance with paragraph 5 of Practice Note 5.

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[Balance of decision omitted: Editor]

2450-85-R Floyed Ryan Deschamps, Applicant, v. United Brotherhood of Carpenters and Joiners of America Local 1030, Respondent, v. **Nepean Roof Truss Ltd.**, Intervener

Adjournment - Practice and Procedure - Termination - Several s.89 complaints pending before Board - Board declining to postpone consideration of timely termination application pending disposition of earlier complaints - Whether a prior defective statement of desire will taint one subsequently filed

BEFORE: *Thomas S. Kuttner*, Vice-Chairman, and Board Members *W. G. Donnelly* and *N. Wilson*.

APPEARANCES: *Paul A. Niebergall* for the applicant; *Frank Manoni* for the respondent; *Russell Zinn*, *Hubert Steenbakk* and *Claude Oulette* for the intervener.

DECISION OF THOMAS S. KUTTNER, VICE-CHAIRMAN, AND BOARD MEMBER N. WILSON; September 19, 1986

1. On July 11, 1986, some time following the hearing of this case, the parties were orally advised that this application for termination of bargaining rights made pursuant to the provisions of section 57 of the *Labour Relations Act* had been dismissed by majority decision of the Board. Its reasons for this decision are herein contained. This was the latest of a series of applications made touching on the bargaining relationship between the respondent herein, United Brotherhood of Carpenters and Joiners of America Local 1030 ("Local 1030") and Nepean Roof Truss Ltd. ("Nepean") and the rights of the employees of Nepean for whom Local 1030 holds bargaining rights. (There has since been filed an Application under section 40a of the Act which was granted by decision of the Board dated July 24 1986, [now reported [1986] OLRB Rep. July 1005] but those proceedings were not germane to the determination here previously made.) Local 1030 was certified on November 5, 1984 for a bargaining unit comprised of "all employees of the respondent in the City of Nepean, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (Board File No. 1629-84-R). In its decision granting bargaining rights the Board held that a statement of desire in opposition to the applicant filed on October 12, 1984 could not, in light of the circumstances surrounding its origination and circulation, be deemed a voluntary one. In addition, the Board refused to give any weight to a second statement of desire filed October 15, 1984 in light of the fact that no evidence was adduced concerning its origination or circulation.

2. In addition, a series of complaints of unfair labour practice have been filed by Local 1030 alleging various breaches of the Act by Nepean. The first of these was filed October 9, 1984 (Board File No. 1864-84-U) and it arose out of the action by Nepean in laying off four employees on that date, all of whom were union members. In it Local 1030 alleged breaches of sections 64, 66 and 70 of the Act. The second of these complaints was filed on November 29, 1984 (Board File No. 2413-84-U) and alleges breach by Nepean of its duty to bargain in good faith contrary to the provisions of section 15 of the Act. These two complaints were consolidated and put down for a single hearing held before the Board on April 23, 1985 at which time the Board, in an oral decision, upheld the earlier complaint and ordered that the employees laid off contrary to the provisions of the Act be recalled to work with full compensation for time lost. A written decision had not yet issued at the hearing of this matter. Because the parties have not been able to agree on the amount of compensation to which the employees are entitled in accordance with the Board's oral decision, Local 1030 has requested that the complaint in Board File 1864-84-U be rescheduled for hearing so that this issue might be addressed. As to the second complaint alleging breach of the duty to bargain in good faith (Board File 2413-84-U) the Board reserved judgement, and a decision had not yet issued, at the time of the hearing of this matter, although that complaint has since been dismissed.

3. On May 27, 1985 Local 1030 filed two further matters before the Board: first, a further complaint of unfair labour practice alleging breach of the duty to bargain in good faith contrary to the provisions of section 15 of the Act (Board File No. 0480-85-U); and second, an application for consent to prosecute arising out of the same circumstances giving rise to the complaint (Board File No. 0481-85-U). These matters were consolidated and put down for hearing before the same panel of the Board which was seized of the earlier complaints. Among the remedies sought by the applicant in this second complaint of breach of the duty to bargain in good faith was the imposition of a first collective agreement between the parties. The Board reserved judgement in this matter as well, and the decision which has recently issued dismissing that complaint, was still pending at the hearing of this matter.

4. There was no evidence before us as to the extent or frequency of negotiation meetings between the parties. There was a conciliation officer appointed and on October 11, 1985, a "no board report" was issued by the Minister under the provisions of section 19(b) of the Act. The instant application was filed on December 18, 1985 in accordance with section 57(1) of the Act, the trade union not having made a collective agreement with the employer within one year after its certification. It is timely pursuant to the provisions of section 61(1)(b) of the Act, thirty days having elapsed after the issuance by the Minister of the "no board report".

5. However, for Local 1030, it was argued first, that inasmuch as the Board decision in the second complaint of a breach of the duty to bargain in good faith was at the time of hearing still pending, a grant of the principal relief there sought - imposition of a first collective agreement - could well render this application untimely. Secondly, and in the alternative, it was argued that even if this application has been filed in a timely fashion, the Board ought to "postpone" considering it on the merits until the issuance of its decisions in the several other section 89 complaints then currently pending, inasmuch as the Board's determination on the allegations contained therein could well have an impact on the voluntary nature of the application for termination of bargaining rights here filed. Reference was made to several Board decisions in support including *Rock Haven Motels (Peterborough) Limited*, [1980] OLRB Rep. Aug. 1240 and *Lesmith Limited*, [1981] OLRB Rep. Feb. 190. In an oral ruling made at the hearing the Board held first that the within application for termination of bargaining rights is timely, and second that it would not postpone its consideration on the merits, which it then proceeded to entertain.

6. In *Rock Haven Motels*, the Board refused either to consolidate an application for termination of bargaining rights with a complaint of unfair labour practice subsequently filed, alleging breach of the duty to bargain in good faith, or to postpone consideration of the earlier filed matter until the complaint of unfair labour practice had been dealt with. The Board rejected the argument that consideration of the application for termination of bargaining rights would preclude it from providing an effective remedy in the event the complaint of unfair labour practices was upheld. Here, it was argued that the Board in the exercise of its remedial powers, might have directed the imposition of a first collective agreement between the parties to rectify the alleged breaches by Nepean of its duty to bargain in good faith. Thus, the entertaining by the Board of the present application could well preclude the panel of the Board seized of the unfair labour practice complaint from granting that remedy, thereby irremediably prejudicing the bargaining rights which Local 1030 currently holds.

7. The Board found no merit in the argument presented. It could well be that if the Board were vested under section 89 with the remedial authority to impose a collective agreement for breach of the section 15 duty of fair representation that a conflict of the type here claimed between the assertion and preservation of bargaining rights by a trade union faced by employer breaches of the duty to bargain in good faith on the one hand, and the exercise by employees of their statutory right to seek a declaration that a trade union no longer represents them on the other, could well arise. However, the Board has consistently maintained since its decision in *DeVilbiss (Canada) Ltd.*, [1976] OLRB Rep. March 49 that it does not, under the provisions of section 89 of the Act have the power to impose a collective agreement in the exercise of its remedial jurisdiction. See as well the *Journal Publishing Company of Ottawa*, [1977] OLRB Rep. June 309 and *Radio Shack*, [1979] OLRB Rep. Dec. 1220, Appl. for jud. rev. dismissed, 30 O.R. (2d) 29 sub. nom *Re Tandy Electronics and United Steelworkers of America* (Div. Ct.), leave to appeal to C.A. refused, O.R. loc. cit.

8. Although the Board is not bound by the principle of *stare decisis*, it is simply inconceivable that a consistent and long standing interpretation of the Act as to the limits of its remedial

powers would be abandoned by any one panel of the Board in favour of that put forward by Local 1030, and relief of the nature sought in the section 89 complaint actually granted. The Board was buttressed in its view by the fact that legislation which would expressly confer upon the Board the jurisdiction to direct the settlement of a first collective agreement by arbitration in the appropriate circumstances was pending before the Legislature during the currency of these proceedings, and has since been enacted as Bill 65, the *Labour Relations Amendment Act*, 1986. Such legislation would have been superfluous if the Board in fact enjoyed such remedial authority under the Act as previously framed. The Board not enjoying the remedial authority which Local 1030 seeks in the section 89 complaint proceedings for a breach of the duty to bargain in good faith, it failed to see how the outcome of those earlier proceedings could have had any effect on the timeliness of the application for termination of bargaining rights currently before us. This application having been filed after the expiry of the time period stipulated by the provisions of section 57(1) and 61(1) of the Act as the time period during which an application for a declaration of termination of bargaining rights may not be made or entertained, it is *prima facie* a timely application in accordance with the terms of the Act.

9. Notwithstanding the timeliness of the application, ought the Board to have postponed considering it on the merits pending its disposition of the several section 89 complaints then outstanding? Assuming that the request to postpone is in effect one to adjourn these proceedings, there can be no doubt that the Board may, as master of its own process (see s. 102(13) of the Act) exercise such a discretion, and indeed its Rules of Procedure expressly so provide, stipulating at s. 82(1) that

The Board may, if it considers it advisable in the interests of justice, adjourn any hearing for such time and to such place and upon such terms as it is considers fit.

To the extent that the decision of the Board in *North American Plastics Co. Ltd.*, [1969] OLRB Rep. Sept. 797 might be said at paragraph 5 thereof to deny a discretion so to adjourn an application of this nature, we decline to follow it. The discretion being present, ought it to have been exercised in favour of the respondent as requested?

10. Unless all parties consent, it is the general practice of the Board to deny a request for an adjournment absent unusual and extraordinary circumstances. In *Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879* (1979), 24 O.R. (2d) 400 the Divisional Court indicated the relevant considerations to be taken into account by the Board in the exercise of its discretion to adjourn as follows:

It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

[p. 404]

Here, Mr. Manoni submitted that the determination by the Board to settle complaints of unfair labour practice currently pending before it could have an impact both as to the timeliness and the substance of the current proceedings. The Board had already rejected the submissions made with respect to timeliness. However, Mr. Manoni argued further that inasmuch as the Board must satisfy itself as to the voluntary nature of the statement of desire of the employees filed in support of this application for termination, it is appropriate that it await the outcome of the section 89 complaints as these could well shed light on the question of voluntariness.

11. Although a history of past conduct contrary to the provisions of the Act may well be a relevant factor in determining the voluntary nature of a statement of desire such as that here under

consideration, it is by no means determinative of the matter. A sufficient nexus must be shown between the earlier conduct in violation of the Act and the circumstances surrounding the origination and circulation of the statement of desire in support of an application for termination in order to establish that the statement has been sufficiently "tainted" so as to bring its status as a true reflection of the voluntary wishes of the employees into question. It is of course helpful in such circumstances to those seeking to discredit a statement of desire to have conclusive evidence of past employer misconduct contrary to the provisions of the Act in the form of a Board determination to this effect. Indeed, there may be circumstances where, because a Board determination on that very issue is pending it might be convenient to adjourn the termination proceedings until the earlier determination has been made. Much depends on the nature of the alleged breach of the Act by the employer. Thus, where these involve those elements of intimidation and coercion associated with sections 64, 66, 67 and 70 of the Act, it may well be expedient for the Board to adjourn and await the outcome of the earlier proceedings rather than to put the parties to the inconvenience and expense of leading the same evidence as to the employer's alleged misconduct a second time in the subsequent proceedings before it. On the other hand, the acts of past employer misconduct alleged may be such that those elements of intimidation and coercion which may have an impact upon the voluntariness of a statement of desire subsequently filed, are absent or minimal, as for instance in an alleged breach of the section 15 duty to bargain in good faith. In those circumstances, no useful purpose could be served of sufficiently overriding importance to justify adjournment of the later proceedings pending the outcome of the earlier ones.

12. Here, of the three section 89 complaints filed, two allege breach of the section 15 duty to bargain in good faith, and in neither had a decision as yet issued at the time of hearing. The Board failed to see how the outcome of those proceedings could have had any significant impact upon the matters at issue then currently before us, and in particular the matter of the voluntariness of the statement of desire filed in support of this application. Commenting earlier on the relationship between an alleged breach of the duty to bargain in good faith and an application for termination of bargaining rights, the Board stated in *North American Plastics Co. Ltd.*, *supra*, at para. 5:

While we recognize that there is a duty to bargain expressed in the Act, there are remedies available to parties if there has been a failure to bargain in good faith. In the present matter bargaining has taken place between the respondent and the intervener, however, an agreement was not reached and the employees have exercised their rights under the Act to engage in a lawful strike prior to this application being made. While the bargaining was between the company and the union and affected the employees, it can hardly be maintained that anything the employees did or did not do contributed to the circumstances which constitute the allegations of the union against the company. Why then should the employees, who otherwise would have an unfettered right within the time limits set out in the Act to bring an application under section 43, [now section 57] be prevented from doing so because of actions, improper or otherwise, of the union or the company? The Board's jurisdiction, once the application has been properly made, is to determine the number of employees in the bargaining unit at the time the application was made and whether fifty per cent of those employees have voluntarily signified in writing that they no longer wish to be represented by a trade union. If the Board is satisfied on those matters, then it must order that a representation vote be taken. We fail to see that there is a discretion given to the Board in this section of the Act to postpone an application or dismiss it for reasons other than those which would fall squarely within its determination of the prerequisites set out in that section for a vote to be held.

We could see no reason to depart from that ruling in the circumstances of this case, and did not do so.

13. The third complaint of unfair labour practice under section 89, that alleging acts of reprisal contrary to the Act taken by Nepean against two employees for activity in support of the respondent (Board File No. 1864-84-U) has been dealt with in an oral decision of the Board issued

on April 23, 1985. There, the Board determined first that the Nepean had violated the Act as alleged, and second ordered the employees dismissed to be reinstated with compensation for lost time. The fact that the issue of *quantum* has not yet been resolved in that matter, has no bearing on the issue here being discussed, namely whether this panel of the Board ought to have postponed consideration of this application pending the outcome of those earlier filed. Inasmuch as the outcome of this third section 89 complaint had in fact been determined, the submission made had no merit. Accordingly, the Board now turns to a consideration of this application for termination of bargaining rights on its merits.

14. Only the applicant was called to give evidence on the origination, preparation and circulation of the petition - the statement of desire filed in support of this application for termination of bargaining rights. Deschamps has been employed on and off for Nepean for a total of 5 years, having been initially hired in 1980 but laid off during the winter of 1983 prior to the certification of Local 1030. He returned to work for Nepean in June 1985 and was again laid off in February of this year, subsequent to the filing of the present application for termination. He was most recently employed as a fork lift operator in the yard.

15. Deschamps testified that upon his return to Nepean in June 1985 he became aware through talk on the shop floor that Local 1030 had in the interim "come in" although he was not aware of the manner in which its bargaining rights had been obtained. His testimony on the details of the shop talk with respect to Local 1030 was not altogether clear, but what was manifest from it was that there were divisions within the bargaining unit as to the benefits of a unionized work place. According to Deschamps the great bulk of employees were dissatisfied with the level of representation given by Local 1030. "They were talking about it at work. You walk in, that's all they talk about at work. They are always putting down the union, and saying that the union was no good and they wanted it out." Yet Deschamps admitted that he was aware that the two Simmons brothers, who were in fact the employees ordered reinstated by the Board in its earlier proceedings, were members of the union and supportive of it. This he had been told by a fellow employee identified during these proceedings only as T7.

16. Indeed much of Deschamps' knowledge of what might be termed the politics of the work place, and the totality of his knowledge of how to proceed in the initiation and processing of an application for termination of bargaining rights was learned from this fellow employee, T7. T7 had been continuously employed at Nepean for a lengthy time period, and certainly throughout the period of the certification and related proceedings, and the subsequent unfair labour practice proceedings which have been outlined above. Sometime late in November or early in December 1985, Deschamps and T7 met for lunch at a restaurant situated close to the work place. There the two spoke of the situation at the shop. It was during that conversation that T7 explained to Deschamps the logistics surrounding an application for termination of bargaining rights. He advised that majority employee support was required and that this must be of a voluntary nature, and thus that it was important not only that the employer not be involved but indeed that no one of management have any knowledge whatsoever about such an application. It was T7 as well who suggested that legal advice be sought and that the cost of such advice be borne by those supporting the application.

17. Shortly after that meeting Deschamps commenced the process which led up to this application for termination by seeking legal advice. He was referred to the office of Mr. Niebergall "by other lawyers" whom he telephoned by referring to the Yellow Pages. This was done on a day which Deschamps chose to take off of work claiming sick leave. He did not testify as to why it was he rather than T7 who made the formal arrangements and acted as chief spokesman for those participating in the filing of this application for termination of bargaining rights.

18. Be that as it may, on the afternoon of Friday, December 13th, Deschamps requested of his foreman permission to leave work early in order to attend to some personal business. In fact he attended at the offices of his solicitor in order to pick up the unsigned petition which had been drafted on his behalf. Earlier that day while in the lunchroom, Deschamps had invited the great bulk of his fellow co-workers to drop over at his place after work. According to his testimony, he did not discuss at that time the reason why they were being so invited nor in fact was he asked. The purpose of course was to have them sign the petition which was to be filed together with the application for termination of bargaining rights. The two Simmons brothers were not present in the lunchroom at that time, nor were they otherwise approached by Deschamps. The great bulk of his co-workers including T7 did in fact attend at his apartment that afternoon as invited. Indeed, they were released early from work that day, the normal working day ending at 4:30 p.m., his co-workers showing up at his apartment at approximately 3:30. There was no evidence as to why his co-workers were released early from work that afternoon, although it is apparently a practice of the employer occasionally to release employees early from work on Friday afternoons. Deschamps further testified that once his fellow workers had shown up at the apartment, he, together with T7, explained the reason for the invitation, circulated the petition and obtained the signature of each person present. The meeting broke up very shortly, as Deschamps had agreed to return the petition to the office of his solicitor that afternoon, and indeed did so at approximately 4:30 p.m. The application for termination of bargaining rights is in fact dated December 13, although it was only filed with the Board on December 18, 1985.

19. The provisions of section 57(3) of the Act mandate that the Board in an application for termination of bargaining rights satisfy itself that not less than 45 per cent of the employees in a bargaining unit "[h]ave voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union ...". From the earliest times the Board has stressed that it must "[b]e vigilant and scrupulous in its concern to protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent". See *Peel Block Co. Ltd.*, 63 CLLC 16,227. This is equally so whether assessing the voluntariness of a statement of desire filed in connection with an application for certification, in which case reference even today is made to the Board's classic statement of the applicable principles articulated in *Pigott Motors (1961) Ltd.*, 63 CLLC 16,264, or one filed in support of an application for termination. The statutory test in the case of each is that of voluntariness, and although the Board has commented in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462 that it may be less inclined to draw inferences adverse to the voluntariness of a statement filed in support of an application for termination of bargaining rights than it would with respect to one filed in connection with an application for certification, it has nevertheless maintained a stance of vigilance and scrupulousness in assuring that the statutory standard of voluntariness is met in these circumstances as well. See *Grove Park Lodge*, [1980] Rep. Feb. 235 and *Ontario Hospital Association*, [1980] OLRB Rep. Dec. 1759.

20. This is all the more so where, as here, there is a history of prior statements of desire having been found by the Board to have failed to have met the statutory standard of voluntariness. This is not to say that in all circumstances a prior defective statement of desire will "taint" or "colour" one subsequently filed, but the Board would be remiss in its obligation to ensure that the standard of voluntariness be met if it failed to bear in mind the totality of a collective bargaining relationship which it is sought to terminate. Here that relationship has been marked by actions on the part of the employer violative of the Act which could well create a climate at the work place which would preclude the voluntary expression of employees that they no longer wish to be represented by a trade union. Thus, the Board places an evidentiary burden - and a heavy one, on those who make application for the termination of bargaining rights to establish on evidence that is both cogent and credible that employees who have signified in writing that they no longer wish to be

represented by the incumbent trade union have done so voluntarily. This the applicant here has failed to do.

21. There is much in the evidence given which the Board finds unsatisfactory. First, there is the insistence on the part of Deschamps that he was totally unaware of the many section 89 proceedings which were pending before the Board from the time of his hire through to the time of the filing of this application. This seems highly unlikely when juxtaposed against his further testimony that there was constant talk on the shop floor about the union, generally of a derogatory nature and indicating dissatisfaction for the level of representation which it was providing. Moreover, Deschamps insists that at no time did he discuss with members of the bargaining unit other than T7 his intention of filing an application for termination of bargaining rights - so that even the invitation extended to bargaining unit members to attend at his apartment was purportedly done without giving any indication whatsoever of the purpose of that meeting. It seems more than passing strange that not only did all of the members of the bargaining unit to whom he spoke accept his invitation on such short notice, but moreover they were released early from work that day - a factor which certainly facilitated in the meeting of the timetable which Deschamps had set, namely to ensure that the petition was signed and filed with his solicitor prior to the close of the business day. Deschamps himself was of course released from work even earlier than his co-workers. We are further told that within the short space of less than an hour, (i.e. between the hours of 3:30 and 4:30) Deschamps' co-workers gathered at his apartment, were advised of the intention to file an application for termination of bargaining rights, were instructed on the necessity of signing a petition to accompany the application and did so, and further discussed the matter sufficiently to decide and agree among themselves to share the legal expenses associated with the application. All of this was done, leaving enough leeway for Deschamps himself to return to the office of his solicitor with the completed petition and in time to sign the necessary application forms at approximately 4:30 that afternoon. It simply strains the credulity of the Board to accept that so much could have been accomplished within such a short period of time.

22. Even without its concerns arising from the testimony of Deschamps, the Board finds the evidence as to voluntariness fundamentally flawed, and for this reason. It is clear from his testimony, that Deschamps was not the originator of this petition nor of the underlying application for termination of bargaining rights. From his testimony it is evident that behind him stood a fellow worker of longstanding employment with Nepean, namely T7. It was T7 who, in the late November/early December meeting at the restaurant advised Deschamps of the possibility of filing such an application and warned him of the many strictures which the Board places on those who make such application to ensure that it represents the voluntary expression of desire of the employees affected. It was T7 who told him who of the employees would be supportive of such an application and who would oppose it. His knowledge would stem from his longstanding tenure of employment at Nepean, a term of employment which, it is to be recalled, extended throughout the entire period of the original application for certification of Local 1030 and the subsequent section 89 unfair labour practice proceedings. It was T7 who counselled the retaining of a solicitor and T7 who assured that the legal costs would be borne equally by all who supported the application. The Board can only deduce from the evidence given that T7 had, previous to this meeting, laid the groundwork for the filing of an application for termination of bargaining rights. He was in a real and actual sense the originator of this application, and it is from him only that the Board can properly assess the circumstances surrounding its preparation and origination. It was open for the applicant to lead this evidence and all the more important that he do so in light of the history of this bargaining relationship, punctuated as it has been by findings of the Board that an earlier expression of opposition to the applicant indicated in a statement of desire filed at the time of certification proceedings was not voluntary, and by a later finding that Nepean has engaged in conduct contrary to the provisions of the Act.

23. But, the applicant has chosen not to lead such evidence, and this at his own peril. For the Board finds that in failing to call such evidence the applicant has failed to satisfy it that the requisite number of employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the incumbent trade union as mandated by the Act. The Board not being satisfied that the statutory requirement has been met, this application must be and is hereby dismissed.

DECISION OF BOARD MEMBER W. G. DONNELLY;

1. Two main grounds for the rejection of the petition are put forward in the majority decision:

2. First, Deschamps identified the person with whom he discussed employee discontent, prior to the circulation of the petition, as "T7". He stated that "T7" was a fellow worker (labourer). He was not called as a witness.

3. It is significant that the Board, in conducting its usual rigorous examination of the petitioner, failed to inquire about T7's relationship to management or lack of it.

4. It is of even greater significance that the union, in argument, did not make an issue of the fact that T7 did not testify but merely urged dismissal on the grounds of credibility and past employer practices.

5. Second, the majority said that no evidence was adduced as to why employees were allowed to leave early on a particular Friday (paragraph 19 of the majority decision). However, that paragraph does record "... it is apparently a practice to release employees from work occasionally on Friday afternoons." My notes say "On Fridays, if there is not much work, employees are allowed to leave early."

6. For these reasons and the fact that Deschamps appeared to be a credible witness to me, I would not have rejected the petition.

1496-86-FCA United Brotherhood of Carpenters and Joiners of America, Local Union 1030, Applicant, v. Nepean Roof Truss Limited, Respondent

First Contract Arbitration - Interest Arbitration - Reconsideration - Timeliness - Panel refusing to reconsider direction to settle first collective agreement made by original panel - Board failing to comply with time limits in s.40a(4) - Time limits directory only - Employer not appearing nor filing any documents - Board not bound to accept unwritten understanding as basis for contract terms - Agreement between union and related employer used as model for collective agreement

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *M. Eayrs* and *C. A. Ballentine*.

APPEARANCES: *F. Manoni* and *Thomas G. Harkness* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; September 24, 1986

I

1. This is an application under section 40a of the *Labour Relations Act* which came into force on May 26, 1986. Since this is one of the first applications under the new section, it may be useful to set out its terms and the context in which the present case arises. The relevant provisions of section 40a are as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

(3) Where a direction is given under subsection (2), the first collective agreement between the parties shall be settled by a board of arbitration unless within seven days of the giving of the direction the parties notify the Board that they have agreed that the Board arbitrate the settlement.

(4) Where the parties give notice to the Board of their agreement that the Board arbitrate the settlement of the first collective agreement, the Board,

- (a) shall appoint a date for and commence a hearing within twenty-one days of the giving of the notice to the Board; and
- (b) shall determine all matters in dispute and release its decision within forty-five days of the commencement of the hearing.

(5) Where the parties do not agree that the Board arbitrate the settlement of the first collective agreement, each party, within ten days of the giving of the direction under subsection (2), shall inform the other party of the name of its appointee to the board of arbitration referred to in subsection (3) and the appointees so selected, within five days of the appointment of the second of them, shall appoint a third person who shall be the chairman.

• • •

(17) In arbitrating the settlement of a first collective agreement under this section, matters agreed to by the parties, in writing, shall be accepted without amendment.

(18) A first collective agreement settled under this section is effective for a period of two years from the date on which it is settled and it may provide that any of the terms of the agreement, except its term of operation, shall be retroactive to such day as the Board may fix, but not earlier than the day on which notice was given under section 14.

(19) The parties, by agreement in writing, or the Minister may extend any time limit set out in this section, notwithstanding the expiration of such time.

2. It will be seen that the statute envisages a two-stage process: an initial determination by this Board as to whether to direct the settlement of a first collective agreement by arbitration, and, if the Board so directs, a separate arbitration proceeding, either before this Board or an arbitration panel to which the parties nominate their own representative. Each stage is expected to commence and be completed within stipulated time periods. The statute imposes quite a rigid regimen on the parties and the Board which is expected to hold hearings, digest the evidence and issue a reasoned decision within a period of thirty days from the filing of the application; and, at the same time, the process must comply with both the *Statutory Powers Procedure Act* and the rules of natural justice. In the case of the arbitration proceeding, the Board is expected to complete the hearing and issue its decision (which could involve drafting a complete collective agreement) within forty-five days of the commencement of the hearing - however long the hearing itself may be, and however numerous or difficult may be the issues in dispute. In practice that means that the Board will have only three or four weeks (including hearing days, and writing time) to resolve issues which, in all likelihood, have occupied the parties' attention for some months. And, since section 40a is applicable to any bargaining rights acquired after January 1, 1984, there may be "quite a lot of water under the bridge" by the time a dispute makes its way to the Board.

3. In recognition of the need to develop a new procedure to accommodate these concerns, the Board issued the following practice note, pursuant to section 102(13) of the Act:

PRACTICE NOTE NO. 19

SETTLEMENT OF FIRST COLLECTIVE AGREEMENT

BY THE BOARD

1. A notice to the Board that parties have agreed that the Board arbitrate the settlement of a first collective agreement must be in writing and must include the following:

- (a) the full name of the trade union and of the employer;
- (b) the address and telephone number of the trade union and of the employer for purposes of service; and
- (c) a copy of the Board decision directing that a first collective agreement between the trade union and the employer be settled by arbitration.

2. Upon receiving a notice which conforms with paragraph 1, the Registrar will schedule the hearing date or dates and give written notice to the parties of such hearing date or dates.

3. Each party must file with the Board no later than nine days from the date on which the notice under paragraph 1 was filed with the Board:

- (a) a proposed collective agreement that it is prepared to execute;
- (b) a list of all those bargaining matters agreed to in writing by the parties and copies of such agreements; and a list of all those bargaining matters which remain in dispute; and
- (c) all of the information, documentation and submissions, that it relies on in support of each bargaining matter which remains in dispute.

4. Copies of all of the material filed with the Board pursuant to paragraph 3 must be delivered by each party to the other, on or before the date on which the material is filed with the Board.

5. Each party must forthwith file with the Board a duly completed certificate of delivery in the following form:

CERTIFICATE OF DELIVERY

I hereby certify that copies of all of the material filed with the Board pursuant to paragraph 3 of Practice Note 19 have been delivered to (*Trade Union or Employer*) as follows on the ___ day of _____, 19__:

Name and Title of officer, official or agent to whom it was delivered _____.

Address at which it was delivered _____.

Name: _____

Title: _____

Signature: _____

6. Upon delivery to it of the material from the other party pursuant to paragraph 4, each party must file with the Board and deliver to the other party within six days, a detailed written reply to the other party's position on each of the bargaining matters remaining in dispute.

7. Except with leave of the Board, a party will not be permitted to adduce any evidence or to make any submissions at the hearing, with respect to any matter that was not disclosed in the written material it filed pursuant to paragraphs 3 and 4 or in its reply filed pursuant to paragraph 6.

The practice note requires more extensive pleadings than in other Board proceedings; however, this information is essential for the parties and the Board members if they are to properly prepare for the hearing.

II - Background

4. On November 5, 1984, the Board certified the applicant union as the bargaining agent for "all employees of Nepean Roof Truss Limited in the City of Nepean, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period". Notice to bargain was subsequently given and the union and employer engaged in protracted negotiations. Those negotiations did not, ultimately, result in the conclusion of a collective agreement.

5. On May 26, 1986, the "first agreement" legislation came into effect. On June 23, 1986, the union requested the Board to direct the settlement of a first collective agreement by arbitration. The Board held a hearing to consider the request. On July 22, 1986, the Board, by telegram, advised the parties that it had decided to direct the settlement of a first collective agreement by arbitration. On July 24, 1986, the Board issued its formal decision confirming its unanimous opinion that arbitration was appropriate in this case [now reported [1986] OLRB Rep. July 1005]. The Board held that:

In all the circumstances, we are satisfied that the process of collective bargaining has been unsuccessful because of the uncompromising nature of the respondent's bargaining position with respect to the term of the agreement, and particularly with respect to its refusal to accept a seniority rights clause, both without reasonable justification. Therefore, the Board directs the settlement of a first collective agreement by arbitration.

We should note that in this "first stage hearing", the employer, although appearing and represented by counsel, decided not to call any evidence. Accordingly, the Board's decision is based upon its interpretation of the statute and the testimony advanced on behalf of the applicant union. For ease of exposition, we will refer to this as the decision of the "Abella panel".

6. On July 29, 1986, the Board received a telegram from counsel for the respondent employer, indicating that the parties had agreed that the Labour Relations Board should arbitrate the agreement. On August 11, 1986, the Board received letters from both parties confirming their agreement. Neither letter conforms precisely to the Practice Note, but the required information can be obtained by a search of the Board's own files, on the assumption that the same counsel would be representing the respondent in the arbitration proceeding, and that his business office was the appropriate address for service. On August 22, 1986, the Board received a formal application from the applicant with attached documentation. That material was not in conformity with the Practice Note either - with results that we will come to later. The respondent made no reply at all and filed no material. On August 22nd, the Board sent the parties (by courier) a Notice of Hearing, in Form 8, fixing Wednesday, September 10, 1986 as the date for the commencement of the arbitration proceeding. The Notice of Hearing contains the following warning in bold type:

IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

7. On Friday, September 3, 1986, the Board received the following letter requesting reconsideration of the direction to go to arbitration made on July 24th.

We are solicitors for Nepean Roof Truss Limited, the Respondent employer in the above-captioned matter. By decision dated July 24, 1986 the Board granted the Applicant's request and directed that a first collective agreement between the parties be imposed pursuant to section 40a of the *Labour Relations Act*. We hereby apply to the Board pursuant to section 106(1) of the *Labour Relations Act* to reconsider and revoke that order and direction.

The respondent makes this application in light of events which have occurred subsequent to the hearing which events make the initial order of the Board clearly inappropriate. The evidence now available, which was not available at the time of the hearing, is related to the Applicant union's bargaining position.

The Chairman in her reasons for decision in Board File No. 0836-86-FC, notes:

"The use of the word 'process' [in section 40a] imparts into the deliberation an examination of the interaction between the two parties. It is a truism that the negotiation of any contract involves a considerable range of bargaining positions and tactics. It is a dynamic exchange, with each party relying as extensively as possible on those positions most likely to induce the other side to accept a tolerable result. The Board must therefore be sensitive to this bargaining reality when considering how each party has conducted itself. It is the totality of the process that is under scrutiny, and the Board must be cautious not to examine the complaint in a factual vacuum. *The conduct of both parties is therefore relevant, not only for understanding why the process has been unsuccessful, but also for assessing whether it has been unsuccessful for any of the enumerated reasons.* This does not intend to suggest that the applicant's conduct will be a bar to the imposed settlement of a first contract, but *rather that its conduct is relevant in assessing the reason for the failure of the process.*

ii) 'The process...has been unsuccessful *because of...*'. This language makes it clear that *section 40a contemplates a cause-and-effect oriented assessment. Unless the applicant can demonstrate that the reason for the unsuccessful process is the...respondent's unreasonably uncompromising bargaining proposals...then notwithstanding the failure to conclude an agreement, the Board is not entitled to direct its imposition.*' (emphasis added)

In this case, the Union contended, as outlined in paragraph 18 of the decision, that the cause of the unsuccessful negotiations was the employer's bargaining position on two matters: a) its insistence on a three year term, and b) its insistence on a "merit provision" rather than a "job security or seniority rights clause".

Since the decision of the Board in this matter, the parties have received the reasons of the Board in Board Files No. 0480-84-R and 0481-85-11 [sic] (the 'bad faith bargaining complaint') referred to in paragraph 8 of the Board's decision in this matter. Secondly, we have received a copy of Mr. Manoni's letter to the Board dated August 20, 1986 in compliance with Practice Note No. 19. The Respondent submits that together these establish that the failure of the process of collective bargaining in this insistence could not be said to be as a result of the bargaining positions taken by the Respondent relating to the term of the agreement and seniority and that in the circumstances the order of the Board was clearly inappropriate.

The Board in its decision in the bad faith bargaining complaint makes the following findings of fact:

The matter that separates the parties from signing a collective agreement relates *solely* to the protection in a collective agreement of the employees who were previously laid off and ordered reinstated by the Board. The position of the employer in this regard is that it is not prepared to include that matter in the collective agreement itself, but is prepared to give the trade union a letter of understanding on the matter. *Mr. Manoni's evidence, however, indicates that on being given that assurance, the union changed its position on the duration of the collective agreement.* (emphasis added)

The only issue between the parties at November 5, 1985, prior to the union's change in position regarding the duration of the agreement, was with respect to protection for the employees who were previously laid off. Therefore, to the extent that the disagreement regarding the term of the agreement could be said to have caused the failure of negotiations, the bargaining position which was the effective cause was not the employer's position but rather the union's change in position.

With respect to the "seniority clause" issue the Board concurred with the employer that the individualization of seniority rights was unacceptable as unfair to other bargaining unit employees. However, with respect to the Company's proposed "merit clause" the Board held:

In today's labour relations climate, and given the significance to the labour movement of this basic principle [of seniority], the company ought to have known that the union could not readily accept a broad merit clause in the absence of a seniority rights provision. The protection of seniority rights is such a fundamental part of the scheme of collective bargaining outside the construction industry, that *the company's refusal to grant it as a general principle, with or without a merit component, could only be interpreted in this case as an unwillingness to engage in a serious attempt to effect an agreement.*" (emphasis added)

This Board in the bad faith bargaining complaint, which dealt with the identical clause and position stated: "In the present case it is therefore clear that the Respondent employer was prepared to deal with the remaining outstanding issue".

Supportive of the Respondent's argument before the Board that its position respecting the term of the agreement and a "merit clause" cannot be said to have *caused* the process to be unsuccessful is the fact that the trade union is now asking this Board to impose an agreement which embodies proposals on these issues which are virtually identical to the respondent's negotiating position.

On August 20, 1986, Mr. Manoni, Representative of the General President of the trade union submitted to this Board the collective agreement which it is prepared to execute. He states: "The Union requested that the parties execute the said agreement *with its duration of 3 years* as per Article 26 of the same agreement". Thus, not only is the trade union prepared to execute a collective agreement of 3 years duration, as proposed by the respondent during negotiations, it is now requesting that this Board impose such an agreement.

The trade union also states in its submission of August 20, 1986 that it is prepared to execute an agreement in the form attached thereto (the Steenbakker Lumber Co. Ltd./Capital Roof Truss (1984) Ltd. collective agreement) "*except for*" the stated necessary changes. None of those

changes relate to a seniority or merit clause or to the individuals for whom Mr. Manoni claimed the trade union required protection. In fact, the position of the Union is now virtually identical to that maintained by the Respondent during negotiations.

Article 11.01 of the agreement the trade union now proposes that this Board impose provides:

- 11.01 "In all cases involving vacancies, promotions, transfers, layoffs, recalls, terminations, wages and vacation scheduling, employees shall be considered on the basis of merit. Merit includes among other things, their skill, ability, qualifications, job duties, performance, record, potential and experience. The Company shall determine the relative merit as between employees in a given case and take action accordingly. Only in the case where two or more employees are determined by the Company to be of equal merit shall the Company take action in accordance with the length of service of the employees. In determining the merit the Company shall act in a fair and reasonable manner."

The Respondent's proposal during negotiations which the trade union rejected is reproduced in the Board's decision at paragraph 11 and provides as follows:

- 11.01 "The Company and the Union agree that in all cases involving vacancies, promotions, transfers, layoffs, recalls, terminations, wages and vacation scheduling, employees shall be considered on the basis of merit, including among other things, their skill, ability, qualifications, job duties, performance, record, potential and experience. The Company shall determine the relative merit as between employees in a given case and take action accordingly. In the case where two or more employees are determined by the Company to be of equal merit, the Company shall take action in accordance with the length of service of the employees."

The situation then is as follows: The trade union is seeking to have this Board impose a collective agreement containing provisions virtually identical to those proposed by the employer during negotiations and which the trade union alleged were the cause of the parties' failure to conclude an agreement.

It is respectfully submitted that this evidence clearly indicates that this Board must have erred in its finding that "the process of collective bargaining has been unsuccessful because of the uncompromising nature of the respondent's bargaining position with respect to the terms of the agreement, and particularly with respect to its refusal to accept a seniority rights clause, both without reasonable justification."

It is further submitted that had the trade union advised this Board on the hearing of this application that it was prepared to accept the employer's proposals regarding the term of the agreement and the "merit clause", this Board would most certainly not have directed that a first agreement be imposed upon the parties. Such a direction in the circumstances is clearly inappropriate and, it is submitted the principles enunciated by this Board in *The Journal Publishing Company of Ottawa Limited*, [1977] O.C.R.B. [sic] Rep. September 549 support the request for reconsideration.

The respondent respectfully submits that in all the circumstances, the decision of July 24, 1986 ought to be reconsidered and reversed.

All of which is respectfully submitted.

8. The reference to Board Files 0480 and 0481 (actually 0480-85-U and 0481-85-U) relates to the decision of another differently constituted panel of the Board which, on the evidence before it, concluded that the respondent had not contravened section 15 of the *Labour Relations Act*. Those complaints were filed on May 27, 1985, hearings were held on November 5, 6 and 7, and the Board issued a short decision on July 31, 1986. For ease of reference, we will refer to this as the decision of the "Franks panel". Section 106(1) of the Act, mentioned in the respondent's letter, reads as follows:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction or ruling.

9. On September 9, 1986, the day before the scheduled hearing, counsel for the respondent sent the following telegram to the Registrar of the Labour Relations Board:

This is further to our telephone conversation of September 5, 1986 in which you informed me that the Board could not consider the employer's request for reconsideration of the order of July 24, 1986 directing the settlement of the first collective agreement until after the hearings scheduled for September 10 and 11, 1986 as one of the Board Members on the original panel is on vacation.

We are in receipt of the letter of Mr. Manoni, Representative of the General President, to the Board dated August 20, 1986 outlining the union's position as to the provisions of a collective agreement which it submits ought to be imposed. In light of those representations, the position taken by the trade union and the provisions of section 40a of the Labour Relations Act, the employer shall not be attending the Board hearing scheduled for September 10 and 11, 1986 nor shall the employer be making any representations or submissions on the terms of the first agreement which the Board should impose.

The employer does submit that this Board appears to have lost jurisdiction to arbitrate the terms of the first collective agreement. The Board has not commenced a hearing within twenty one days of the giving of the notice to the Board of the parties agreement that the Board arbitrate the settlement, as is required by section 40a(4) of the Labour Relations Act. The employer has not agreed in writing [sic] or otherwise to an extension of that time limit and does not now do so. We are not aware of any extension of the time limit granted by the Minister to extend the time limits pursuant to section 40a(19). If such a request has been made we have not been provided with an opportunity to make representations to the Minister as to whether he ought to extend those limits and would question the validity of such an extension in the circumstances.

All of which is respectfully submitted.

This telegram was apparently not sent to the union, which only received a copy on the morning of the hearing. It was the first indication that the employer had any concerns about expedition or "timeliness".

10. On the day of the hearing no one appeared on behalf of the respondent employer. We did not have the benefit of the employer's submissions on the tricky legal question of "timeliness" (which counsel characterized as "jurisdictional"), nor did we have the benefit of the employer's evidence or representations on any of the other issues arising in this arbitration proceeding. And as we have already noted, this is only the second case under the new procedure, so there is no established jurisprudence on how the new section should be interpreted and applied. The union was not represented by counsel either, and had some difficulty responding to the legal issues and assembling the factual material necessary for the Board's determination.

11. We shall deal first with the effect of the request for reconsideration, then turn to the "timeliness issue" and finally consider the substantive terms of the collective agreement. The Board ruled orally on the first issue and reserved judgement on the other two.

III - The Effect of the Request for Reconsideration

12. Section 106(1) of the Act provides that a Board decision will be "final and conclusive for all purposes", but includes a discretionary power to reconsider, vary or revoke any such deci-

sion, at any time, if it considers it advisable to do so. On its face, the language of the statute is broad enough to permit one panel of the Board to reconsider a decision made by another panel (subject to section 102(13) and the rules of natural justice). However, it was our view that we should not do so, nor were we prepared to adjourn the arbitration proceeding pending a review by the "Abella panel".

13. The request for reconsideration involves a comparison of the factual findings made by different panels of the Board, in different proceedings, involving different legal issues, and conducted by the parties in a different way. For example, the Franks panel was considering whether there had been a breach of section 15 of the Act and presumably had before it evidence from the parties as to the course of their negotiations (the decision itself is very short). The Abella panel was considering section 40a(2) which is triggered "irrespective of whether section 15 has been contravened" and the employer chose to call no evidence. We are in no position to say what was before either panel of the Board, whether there really are conflicting findings of fact or whether it matters in the circumstances. Nor are we in the best position to assess whether the facts raised in the respondent's letter could, or should with due diligence, have been raised earlier. Those are matters which the Abella panel is in the best position to consider. We do observe, parenthetically, that the request for reconsideration would appear to have been made after the date when, according to the respondent's "timeliness argument", the arbitration proceeding should already have commenced.

IV - Timeliness

14. As we have already mentioned, the respondent identified this legal issue in the telegram sent to the Board the day before the hearing, but advanced no argument and referred to no authorities in support of its position. The respondent simply asserted that, because the Board did not begin the arbitration hearing within 21 days, it had "lost jurisdiction". Is this a sensible interpretation of section 40a? We think some enlightenment can be gleaned from the structure of the Act itself, and at least one Divisional Court decision which was raised in argument and is quite close to the present case. There are really several related aspects to the question: when does one begin to "mark time"; how does one count "days"; and, most important, what is the legal effect if the hearing does not commence or a decision is not issued within the time specified in the statute?

15. In the first place, it must be noted that section 40a does involve quite an extraordinary procedure in which both the hearings and the decision must be completed within a relatively narrow time frame. In that context, it appears to us that the notification to the Board contemplated by section 40a(3) can be, and here was given by telegram dated July 29, 1986. Indeed, given the seven-day response time and the vagaries of the mail system, the most prudent method of communication to the Board would be by telegram, telex, or courier. Accordingly, time began to run with the receipt of the telegram on July 29th; and assuming, as we do, that the word "days" in the section means "calendar days" not "work days" or "days exclusive of holidays", the Board should have given the required Notice and commenced the arbitration hearing no later than Wednesday, August 19th (which, incidentally, is thirteen "working" or "business" days from the date of the telegram). Even if we discount the telegram and mark time from the parties' letters received by the Board on August 11th, the September 10th hearing date is still beyond the twenty-one day time limit. And, it is not disputed that the Minister has not extended the time limits. (We do not comment upon whether he *should* do so, or whether, as the telegram suggests, such decision would be a "statutory power of decision" which under the *Statutory Powers Procedure Act*, or as a matter of fairness, could only be taken after hearing the representations of the parties.)

16. We conclude then, that the Board did not comply with the time limit specified in section 40a(4) of the Act. It is not clear why that happened, i.e., whether it was an administrative over-

sight in dealing with a new procedure, or, as appears more likely, the Board was awaiting the filings contemplated by the Practice Note and neither of the parties was pressing for an early hearing date. We need not speculate. What is clear, is that whatever delay there may have been cannot be attributed to the applicant, and no timeliness complaint was raised by the employer until the day before the hearing.

17. Does the Board's failure to commence the hearing within twenty-one days deprive it of jurisdiction to consider this matter; or, to put it another way, does that failure prevent the applicant from proceeding in the forum to which both parties have already agreed? Does what is, at best, an administrative oversight, deprive the union, through no fault of its own, of the opportunity of presenting its case before the Board? We do not think so.

18. In our view, the time limits in section 40a(4) are not "mandatory", in the sense that a failure by the Board to meet them deprives the parties of the process which they have already voluntarily set in motion. We acknowledge the concern for expedition, but cannot accept that the Legislature ever intended that a failure by the *Board* to respond in a timely way would render the entire process a nullity. There is no prejudice to the employer, which never pressed for an early hearing or even thought to raise the matter until three weeks after, it says, the hearing should have started. In the union's case there is the obvious potential for prejudice, not only because this forum would not be available to it through no fault of its own, but also because it is not obvious, having regard to the terms of the *Act*, that it has any other place to go. And in this particular case, although the arbitration proceedings *started* late, it has, in fact, been *completed* within the total time frame contemplated (i.e., 66 days from July 29). We do not think that the failure of the Board to schedule a hearing within twenty-one days of July 29th deprives us of jurisdiction to consider the substantive issues in dispute.

19. There are several cases to which we might usefully refer. Although they are not directly on all fours with the matter before us, they do provide some insight into how the Courts view similar situations.

20. In *Air Care Ltd. v. United Steelworkers et al.*, (1974) 40 D.L.R. (3d) 467, [1976] 1 S.C.R. 2, it was argued that the award of a board of arbitration was a nullity, because the board had failed to render its award within the time limits specified in a collective agreement. Mr. Justice Dickson, speaking for the Court, was of the view that the submission was without merit:

The right of a party should not be lost or in any way prejudiced as the result of dilatory conduct on the part of a board over which it has little or no control.

21. *Re Metropolitan Toronto Board of Police Commissioners and Metropolitan Toronto Police Association (Unit B) et al.*, (1973) 37 D.L.R. (3d) 487 (Ont. Div. Ct.) involved an arbitrator appointed pursuant to section 33 of the *Police Act*, which provides that "the Board of arbitration or arbitrator, as the case may be, shall commence the arbitration proceedings within thirty days after it is constituted or he is appointed and shall deliver the decision or award within sixty days after the commencement of the arbitration proceedings". The board of arbitration failed to deliver its decision within sixty days and the employer challenged the award because of non-compliance with this time limit. The Divisional Court dismissed the application and commented, in part:

In the instant case the duty imposed by the Statute is a public one. Also, the parties to the proceedings have no control over the Board and any difficulty that has arisen is not as a result of any default on their part. In particular they have no direct control over the time in which the award is to be delivered. That is the responsibility of the Board. If it were held that failure to observe the time-limit made the award a nullity, the purposes of the Act might be completely

frustrated by events over which the parties have no control. One would be hesitant to attribute such an intention to the Legislature in the absence of explicit and compelling words.

There is much case law on the question of when "shall" is to be construed as imperative and when it is to be construed as directory. The applicant referred to no case where such words were held to be imperative where the duty was a public one and where the parties had no control and where to so hold would cause serious inconvenience or injustice to persons having no control over those entrusted with the duty. In the present case, I repeat, there is no default by the parties.

22. *Re Lincoln County Roman Catholic Separate School Board and Buchler*, (1972) 1 O.R. 854 concerned a board of reference appointed pursuant to the *Education Act* to consider the propriety of a teacher's discharge. The Minister was required to establish the tribunal within thirty days, and when its members were appointed a few days after the thirty-day period, the School Board objected to its jurisdiction. However, Kelly J.A. concluded (for the Court) that:

...it is our opinion that the provision in regard to time in the section is directory only and that the jurisdiction of the Minister to make an appointment is not confined to the 30-day period. In this case no allegation is made that the School Board was in any way prejudiced by the delay nor is it sought to attack the proceeding on this basis.

It is our view that the appointment which was made within a few days of the expiration of the 30-day period is not defective and that the Board of Reference was not on this account thereby without jurisdiction to discharge the duties committed to it.

23. In the instant case there is no default by the trade union and no prejudice to the employer arising from a few days delay. None of the authorities of which we are aware support the draconian interpretation urged upon us by the employer, nor is there any policy reason to lean toward that interpretation. In our opinion, the time limit is directory only. The fact that the hearing may have started late does not deprive us of jurisdiction.

24. It is unfortunate that the respondent chose not to appear to address this or any of the other issues arising in this case, however, the Notice of Hearing states, explicitly, that the purpose of the hearing was to entertain the parties' evidence and representations on *all* issues in dispute. By not appearing, the respondent was taking the chance that the Board would reject its jurisdictional argument (as we do) and proceed to the merits of the case. That is the course of action urged upon us by the trade union and the one which we consider most appropriate.

V - The Contents of the Collective Agreement

25. Unlike section 40a(2), section 40a(4) does not specify any particular criteria which the arbitration board should consider in determining the contents of the first collective agreement. The only limitations are in section 40a(18), which prescribes a two-year term of operation if that issue is in dispute, and section 40a(17), which requires the Board to accept, without amendment, any "matters agreed to by the parties, in writing". Section 40a(17) is presumably designed to minimize the degree to which the arbitration proceeding will intrude into the process of free collective bargaining; however, it means that the board of arbitration must necessarily decide what the parties have agreed upon in writing and what remains in dispute. Moreover, if there is some question about that, it may be necessary to hear the parties' evidence and representations. That is why the Practice Note, in paragraph 3, specifically requires each party to file with the Board "a list of all those bargaining matters agreed to in writing by the parties and copies of such agreement; and a list of all those bargaining matters which remain in dispute". Here, of course, the employer filed nothing at all and what the union filed did not conform to the Practice Note.

26. In support of its position, the union tendered what was described as the “Steenbakkters” agreement between the union and Steenbakkters Lumber Co. Ltd./Capital Roof Truss (1984) Ltd., dated July 15, 1986. Mr. Manoni testified that these companies were related to the respondent, that there were common principals, and that the nature of the business was similar. Because of these similarities, the Steenbakkters agreement (or its predecessors) had formed the basis or “point of departure” for negotiations with the respondent. Eventually, after protracted bargaining, much reluctance on the union’s part, and an unsuccessful strike against Steenbakkters Lumber Co. Ltd./Capital Roof Truss (1984) Ltd., the parties reached agreement that, with a few exceptions, the terms of the union’s collective agreement with the respondent would be identical to those found in the Steenbakkters agreement. The most important exceptions concerned the duration of the collective agreement and a clause relating to employee seniority. The union was not particularly happy with the Steenbakkters agreement, but submitted that, since it was the basis upon which the parties had bargained, it should be the basis of the first collective agreement which we are called upon to impose.

27. We have no reason to doubt the union’s evidence concerning the course or basis of the bargaining. Not only is that evidence uncontradicted, but it also appears to be consistent with the findings of the Franks and Abella panels, and the submissions made in the respondent’s request for reconsideration. The Board decisions and counsel’s letter all suggest that the parties were in agreement on many items and that there were only one or two issues remaining *in dispute*. Unfortunately, neither the decisions nor counsel’s letter tell us what had, in fact, been *agreed to*, nor is there anything before us to establish what matters (if any) had been formally agreed to *in writing*. Thus, although we think that we have a reasonably reliable picture of the parameters of the parties’ dispute, the evidence does not establish that there were *any* “matters agreed to by the parties *in writing*”, which, in accordance with section 40a(17), we must “accept without amendment”. That being so, we find that there is no limitation in section 40a(17) on our ability to settle the terms of the parties’ first collective agreement. This is not to say that we should ignore what the parties have agreed to, or the basis on which they conducted their negotiations. It is simply that, in the absence of agreement “*in writing*” (whatever that might mean in particular cases), the Board is not bound to accept unwritten understandings.

28. The union submits that the situation at the related company established the basis for bargaining and that, insofar as the Board is able to do so, the collective agreement which we impose should mirror the Steenbakkters agreement. That, the union says, requires a three-year term of operation retroactive to July 15, 1986, and a “job security/merit” provision patterned on what is now Article 11 of the Steenbakkters agreement.

29. We are inclined to agree with the union’s general proposition, with one exception: in the absence of the parties’ agreement on the contract’s term of operation, we are bound by section 40a(18) to settle a first agreement “effective for a period of two years from the date on which it is settled”. We do not think that we have any jurisdiction to prescribe a longer term. Apart from that, however, the agreement which we hereby settle and set out as Appendix “A” to this decision is modelled substantially on the Steenbakkters agreement with such changes as, in our view, are necessary, having regard, *inter alia*, to the terms of the certificate, the differences in the respondent’s operation, the union’s submissions on the relationship of the bargaining at the two locations, and the impact of a two-year term on the prescribed wage pattern. We should add (and emphasize) that but for the union’s submission that it was content to accept the Steenbakkters agreement as a model, we would not necessarily have imposed those terms, nor would we have drafted those clauses in the way in which they are currently framed. In particular, the agreement should not be considered as a model or precedent for other situations; nor should it necessarily be regarded as either our own, or “a fairly general consensus of what should be in a collective agreement” - to

borrow the words of British Columbia Labour Relations Board in *London Drugs Ltd.*, [1974] 1 Can LRBR 140, at page 147.

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[Collective agreement omitted: Editor]

0118-86-M United Brotherhood of Carpenters and Joiners of America, Local Union 93 and Richard Restall, Applicants, v. **Ottawa-Carleton Bricklaying and Masonry Limited**, Respondent

Construction Industry Grievance - Union steward dismissed following verbal exchange with management on construction site - Union steward having right to challenge authority of management - Grievance allowed

BEFORE: Harry Freedman, Vice-Chairman, and Board Members *I. M. Stamp* and *L. C. Collins*.

APPEARANCES: *Denis Power*, *Wilf Clermont* and *Richard Restall* on behalf of the applicants; *Jacques A. Emond* and *Richard Olivieri* on behalf of the respondent.

DECISION OF THE BOARD; August 20, 1986

1. The name of the respondent is amended to read: "Ottawa-Carleton Bricklaying and Masonry Limited".
2. The Board gave the following oral decision at the conclusion of its hearing in this matter in Ottawa on August 18, 1986:

Richard Restall was dismissed by the respondent on April 1, 1986. Mr. Restall, who was a union steward on the respondent's job, was involved in a verbal exchange with Rick Olivieri, the respondent's vice-president and superintendent on the job in question, over what Mr. Olivieri viewed as a lack of production on the part of the carpenters involved in building a parking garage.

On April 1, Mr. Olivieri witnessed the employees not working. He stormed towards the crew, quite angry, and told the employees that unless their work picked up they were going to be fired. He also asked them if they got the message. Mr. Restall responded to Mr. Olivieri, according to Mr. Olivieri's evidence, by stating "I'm the shop steward, get the message."

Mr. Olivieri testified that he did not intend to dismiss anyone when he went to speak to the employees. However, Mr. Restall's comment to him was the last straw. Mr. Olivieri had spoken to Bob Mercier, Mr. Restall's foreman, on at least one specific occasion about Mr. Restall's lack of work, and to others about Mr. Restall's poor attitude and poor productivity.

We have no doubt that Mr. Restall was, as counsel for the respondent submitted, disdainful of Mr. Olivieri. It may well be that Mr. Restall viewed

himself as being in a special position as a union steward. We also believe that Mr. Restall's approach to dealing with problems at the job site did not endear him to Mr. Olivieri.

The applicant and respondent are bound by a collective agreement. Article 6 of that agreement states:

"ARTICLE 6 - MANAGEMENT RIGHTS

The Union acknowledges that it is exclusively the function of the Employer to maintain order, discipline and efficiency, and to hire, retire, promote, demote, transfer, lay-off and/or suspend, discipline or discharge employees for just cause. Any complaint of improper suspension, discipline or discharge may be made the subject of a grievance as hereinafter provided subject to the right of employee concerned to lodge a grievance under the orderly procedure contained in this Agreement.

The Union further recognizes the right of the Employer to operate and manage its business in all respects in accordance with its commitments and responsibilities subject to the terms of this Agreement."

In this case we must decide whether the respondent had just cause to discharge the grievor, Mr. Restall. Counsel for the respondent submits that the comments of Mr. Restall amounted to insubordination, and therefore triggered a review of his previous disciplinary record, which counsel conceded was comprised of, at best, one oral warning, but several criticisms that did not constitute discipline.

We do not need to determine whether employers in the construction industry must engage in progressive discipline in order to invoke the doctrine of culminating incident or whether there is a lower standard of what constitutes just cause in the construction industry as opposed to other industries.

In our opinion, a union steward on a construction site has the right to question and indeed challenge the authority of management, so long as the challenge to authority is reasonable in the circumstances. In this case, Mr. Olivieri was angry and was shouting at the employees represented by the applicant union. Mr. Mercier, the foreman, testified that he would not speak to his cows in the way that Mr. Olivieri spoke to his men. We do not need to evaluate Mr. Olivieri's management style or the way in which he seeks to motivate the employees who work for him. Nevertheless, Mr. Olivieri's tone and manner provoked a response from the union steward. Mr. Restall was not diplomatic and displayed little respect for Mr. Olivieri during this exchange. However, the same can be said for Mr. Olivieri and his lack of respect for Mr. Restall. In our opinion, Mr. Restall's response, while not a response that we would encourage from union stewards to promote good labour relations, cannot be viewed as conduct meriting any discipline.

In our view, Mr. Restall's response or comment was not beyond the bounds of reasonableness in challenging Mr. Olivieri's rights under the collective agreement when he indicated that Mr. Restall and the others would be fired if their productivity did not improve.

Therefore, this grievance is hereby allowed.

We direct the respondent to forthwith compensate the grievor for the losses of earnings that were caused by the respondent's violation of article 6 of the collective agreement.

If the parties are unable to agree on compensation, we will remain seized with determining that issue.

We will now invite submissions with respect to whether a reinstatement order is warranted in view of the fact that the job, that is the parking garage, for which the grievor was hired was completed before the last day of this hearing.

3. At the conclusion of the Board's oral decision, the Board was asked by counsel for the applicant to make the following note:

The Board notes that as of the decision in this matter, the job for which the grievor was hired is substantially complete, with only two carpenters still employed. Therefore, Mr. Restall and the applicant union are not seeking reinstatement of Mr. Restall to employment with the respondent.

3039-85-R; 3179-85-R Teamsters Chemical Energy & Allied Workers Union Local 424, Applicant, v. **Resco Chemicals & Colours Ltd.**, Respondent, v. Group of Employees, Objectors; Resco Chemicals and Colours Ltd. and Resco Distributing Company Limited, Applicants, v. Teamsters Chemical Energy and Allied Workers Union, Local 424, Respondent

Bargaining Unit - Certification - Reconsideration - Existence of part-time employees not disclosed to Board - Part-time employees swept into bargaining unit when unit defined in tag-end terms - Unit redefined on reconsideration

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *B. L. Armstrong* and *W. H. Wightman*.

DECISION OF THE BOARD; July 28, 1986

1. This is a request for reconsideration of a decision of the Board dated April 23, 1986 [[1986] OLRB Rep. Apr. 544]. In order to appreciate the context in which the present request arises, and the problems which it poses, it is necessary to sketch in some background. One might usefully begin by quoting paragraphs 3 and 4 of the earlier decision:

3. The respondent employer is a manufacturer of colourants and has production facilities in Mississauga, Ontario. On January 28, 1986, the applicant union applied for certification as bargaining agent for what might be described as a "standard" production employee bargaining unit. (See Board File No. 2616-85-R.) That application, as initially framed by the union, would have included the five laboratory staff in the production bargaining unit, however, the employer objected. Eventually the parties agreed that quality control personnel would be included in the production bargaining unit, but the laboratory staff would be excluded. On the basis of that agreement both parties waived their right to a formal hearing and, because the union had the

requisite degree of support, the Board issued a certificate. The agreed bargaining unit is described as follows:

All employees of Resco Chemicals & Colours Ltd. in Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales, clerical and laboratory staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

4. Counsel for the employer advised the Board that the employer had requested the exclusion of laboratory personnel because, in its view, those employees did not have a community of interest with production workers, and for collective bargaining purposes, technical or laboratory employees are usually grouped together with office workers - as, indeed, they often are. Counsel for the union explained that the union was agreeable to excluding laboratory personnel because, in the union's experience, they had been treated as a separate bargaining unit unto themselves. It is interesting to note that on the basis of the facts disclosed in the Board's decision in the earlier case, the union would have been certified without recourse to a representation vote *whether or not* the laboratory personnel had been included in the production bargaining unit. In other words, there is no basis for any suspicion that the union was "tailoring" its bargaining unit description to its distribution of membership support. The union was "certifiable" whether or not the laboratory staff were included in the production bargaining unit; and, had the union pressed its original claim, the Board would have issued an interim certificate and conducted an inquiry to determine whether the laboratory personnel should also be included in the bargaining unit. As it was, the union and the employer (for different reasons) reached agreement on their exclusion, and proposed to the Board a bargaining unit description which (superficially at least) reflects the one which the Board generally considers appropriate. Since the proposed unit reflected both the agreement of the parties and the Board's established practice, there was no need to inquire further. The union was certified to represent the employees in that unit.

2. The earlier certification application and eventual certificate (dated February 21, 1986) established the union's bargaining rights for what might be described as a "generic" or "standard", "full-time production unit". The employees remaining unrepresented were "office, sales, clerical and laboratory staff; *any individuals* working on a part-time basis (i.e., regularly employed for not more than twenty-four hours per week) and any students employed during the school vacation period". These individuals, excluded from the bargaining unit, were a potential target for subsequent organization by the union. That is what happened.

3. On March 10, 1986, the union made a second certification application, and at the hearing on April 4, 1986, the union indicated that it was only seeking to represent the laboratory staff. Both counsel argued on that basis: the union contending that the laboratory staff were an appropriate "tag-end to the production unit" and the company asserting, in effect, that the Board should follow its usual practice of grouping together all office, clerical and technical employees into one "white-collar" bargaining unit.

4. But that is not precisely how the application was framed, nor the way in which the employer drafted its reply. The union's (second) certification application contains the following description of the unit which the union was seeking:

All employees of Resco Chemical & Colours Ltd. at Mississauga, save and except supervisor, those above the rank of supervisor, clerical, office and sales staff, and persons in any bargaining unit for which a trade union held bargaining rights as of March 10, 1986.

The union's estimate of the number of employees in its desired unit suggests that it had only lab staff in mind, but the proposed bargaining unit description is actually broader than that. It would *exclude* clerical and sales staff, but when read together with the earlier certificate it would clearly

include laboratory staff, part-time production workers (if any), and students employed in other than a sales or clerical capacity. The indication of the union's real intention is not found in the description of the bargaining unit, but rather in the style of cause where the respondent employer's name is listed as "Resco Chemicals & Colours Ltd. (laboratory staff)". The bargaining unit description is rather misleading, and the Form 6 notice to employees is, at the very least, ambiguous insofar as it relates to the potential impact on some employees excluded from the production unit, not working in the lab, but not clearly excluded from the proposed bargaining unit either.

5. How did the respondent reply to the application? In the first place, it proposed a different bargaining unit description, framed as follows:

All employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by the Ontario Labour Relations Board Certificate dated February 21, 1986".

The employer's proposed unit *would not* encompass any part-time employees or students (wherever they were working) but *would* cover office and clerical employees in addition to the lab staff who were the union's real target.

6. In addition, the respondent filed a "Schedule 'A'" which is established under the Rules as part of Form 4 and requires an employer to provide a "list of all of the full-time employees in the *bargaining unit described in the application*". There is a parallel requirement to provide a Schedule "B" list of part-time employees working not more than twenty-four hours per week. The employer responded (correctly as it turned out) as if the application related only to lab employees even though the unit described in the application is broader than that, and read literally would include part-time production employees and students. There was no mention at the hearing of any part-time production employees and nothing in the material before the Board to indicate their existence. Perhaps the Board should have inferred that possibility from the way in which the first description was framed, but no one at the hearing mentioned it. The focus of the debate was whether the bargaining unit should be limited to laboratory staff or should, instead, encompass all full-time, office, clerical and technical personnel. The duties of the lab employees were not seriously in dispute. The question was whether to give them their own bargaining unit or group them together with office and clerical workers.

7. After considering the facts, the Board determined that the laboratory staff did *not* share a community of interest with the office and clerical workers but, on the contrary, had a community of interest with production employees in much the same way as the quality control personnel who had earlier been included in the production unit. Indeed, the Board observed:

If the facts before us had been before the earlier panel of the Board, we are quite confident that the laboratory staff (like the quality control personnel) would most likely have been included in the "production" bargaining unit.

The Board then went on to say:

21. Of course, there was no intentional misrepresentation or intent to mislead the Board in the earlier case. We are satisfied that when the employer sought the exclusion of laboratory staff it was acting in good faith upon its own understanding of Board practice and their community of interest. The fact remains, however, that a group of employees who should probably be part of the "production" bargaining unit have, unintentionally, been left out. The question then becomes what should the Board do: sanction a bargaining unit which would not ordinarily be considered appropriate by itself or, alternatively, require the laboratory employees to bargain

together with the office and sales staff with whom they have no strong community of interest and who, to date, have given no indication of any interest in collective bargaining. The first option leads to fragmentation of the bargaining structure, which can sometimes lead to collective bargaining problems (in this regard see *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, and *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250). The second option would result in a dismissal of this application for certification because, although the laboratory employees have indicated an interest in collective bargaining, the office staff have not. (We should note, parenthetically, that there might also be a problem if the lab staff were numerous enough and the union's support strong enough that a certificate would issue even if the office employees were "swept in" to a generic office, clerical and technical bargaining unit. The unit might then include employees with divergent collective bargaining interests.)

22. We have considered the alternatives and the parties' representations and have concluded that the better balance is struck by our adopting the approach taken by the Board in *B. F. Goodrich* - although we do *not* adopt its terminology. A "tag-end" unit is a unit of unrepresented employees who, for one reason or another, have been excluded from the standard or generic bargaining units in place in an employer's enterprise. A "tag-end unit", as the name suggests, is ordinarily the last bargaining unit, encompassing all unrepresented employees and fashioned in terms which will ensure no further fragmentation of the bargaining structure. There is only *one* "tag-end unit". There is not a "tag-end" unit corresponding to each existing bargaining unit. By its very terms, a tag-end unit may include a diverse grouping of employees with no strong community of interest with each other. The suggestion that there can be a "tag-end" to each of the generic or existing bargaining units would double the number of potential bargaining units in any enterprise and raise the very spectre of fragmentation that the notion of a "tag-end" was designed to avoid. We repeat: there can be only one tag-end unit.

23. Having regard to the unusual circumstances of this case, we are prepared to accede to the union's request and find appropriate a unit of employees encompassing laboratory staff, but in order to avoid the potential for undue fragmentation of the bargaining structure, we think it should be framed in "tag-end terms". We are not persuaded that a bargaining unit framed in this way would create any serious collective bargaining problems for the employer and it will leave open to the office staff a coherent generic bargaining unit should they wish to engage in collective bargaining some time in the future. Finally, we should note that the union and the employer are currently engaged in collective bargaining for a collective agreement to cover the plant unit. There is no collective agreement yet in place so that any problems arising from the unfortunate (if inadvertent) exclusion of laboratory staff from the production unit can be addressed at the bargaining table.

24. For the foregoing reasons, the Board finds that the appropriate bargaining unit should be framed as follows:

All employees of Resco Chemicals and Colours Ltd. and Resco Distributing Company Limited in Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, and persons for whom any trade union held bargaining rights on the date hereof.

8. The Board was faced with a dilemma. On the basis of the evidence and the usual criteria for measuring community of interest, the lab employees should have been in the production unit. But they had been left out. Should the Board reconsider that earlier decision as it was entitled to do under section 106(2) of the Act? That might pose problems too. It would involve reopening a decision, made some months earlier, by another panel of the Board, based upon the agreement of the parties. Should the union be permitted to resile from what, in retrospect, was an unwise agreement? Alternatively, the Board could adopt a "second best solution" and try to draft a unit description which would accommodate the employees' interests in this unusual situation (i.e. not to be "lumped in" with employees with a different community of collective bargaining interest), minimize the potential for fragmentation (a concern usually voiced by employers) while at the same time not sending a false signal to the labour relations community that the Board was relaxing its

longstanding opposition to departmental bargaining units. Over the years the Board has been exceedingly reluctant to describe or grant bargaining units based on departments because of the balkanization of collective bargaining that that would produce. Any false signal in this regard would inevitably lead to uncertainty and litigation for the fact remains that, whatever problems may have arisen in this case, the parties' understanding of the Board's usual approach to bargaining unit determinations prompted a resolution of the first certification application without the necessity of a formal hearing. Precedent has its purposes - not least of which is to avoid unnecessary disputes in an industrial relations process which is already prone to adversarial relationships.

9. In the result, the Board decided not to describe the unit in terms referring solely to laboratory staff. Recognizing that the lab employees should be in the production unit but were not, and should not in this case be in an "office and clerical unit", the Board tried to describe what was left over in a general way, using the terminology of the "tag-end unit" to describe a group who for one reason or another had been left out of the "generic" bargaining unit.

10. The effect of the Board's bargaining unit description was obvious - at least with the benefit of hindsight. In an effort to describe the unit in "tag-end terms" to avoid the possibility of future fragmentation, the Board adopted bargaining unit terminology which would include part-time production workers who, in the ordinary course, would themselves form what the Board described as a "generic production" bargaining unit. Moreover, those employees had been included either without notice to them or, at best, with the rather ambiguous notice mentioned above.

11. How did this problem come to light? Shortly after the release of the Board's decision, counsel for the respondent wrote to the Board to advise that there were several part-time production workers who would fall within the ambit of the Board's bargaining unit description who were not included on the schedule filed by the employer. Their presence should be considered in determining whether the union is entitled to certification. He is quite right. The problem though, is that it was not the Board's intention to include part-time production workers in the bargaining unit, and it would not have done so had it known of their existence, nor would such part-time workers ordinarily be included in the kind of "tag-end" unit the Board tried to create. They would typically be grouped in a part-time production bargaining unit, mirroring the full-time one, but encompassing workers whose part-time status would ordinarily indicate a different community of interest. In the absence of the agreement of the parties, the Board would not include (and the earlier panel did not include) part-time production workers in the full-time production bargaining unit and there is as little reason to include this cluster of part-time production workers in a unit of full-time laboratory staff. That result was inadvertent and unintentional, and the Board would not have made the decision (particularly without adequate notice to those employees) if it had been aware of the existence of part-time production workers.

12. How should the Board rectify this situation? There is no way that is entirely satisfactory. The present unit description is based upon inadvertence and inadequate information and to sweep the part-timers in (whatever the result) would require a new notice, a new terminal date, and a new hearing. The alternatives of reconsidering the production unit certificate or simply giving the union its proposed "laboratory" bargaining unit, pose the difficulties to which we have already referred. There is no entirely satisfactory solution. However, having considered the situation, we have come reluctantly to the opinion that we should reconsider our decision and the bargaining unit description found in paragraph 24 and should frame the bargaining unit explicitly in terms of the laboratory staff. Our only reservation concerns the possibility of a history of part-timers working in the lab and/or students employed in the lab during the school vacation period which, ordinarily, would warrant their exclusion and potential grouping in a separate part-time lab

unit. The evidence was not clear on this point and given the unfortunate history of this case, the Board is reluctant to speculate. Accordingly, while indicating that we are prepared to reconsider our decision along the lines mentioned above, and, to that end, we hereby revoke the certificate issued on April 23, 1986, we are not prepared to finalize the bargaining unit until we receive the parties' submissions, in writing, as to the presence or absence of a history of part-time lab employees, and/or students.

13. Having regard to the foregoing, the Board hereby certifies the applicant on an interim basis for all employees of Resco Chemicals and Colours Ltd. and Resco Distributing Company Limited (being "one employer" under the *Labour Relations Act*) in its laboratory in Mississauga, save and except supervisors, persons above the rank of supervisor, *persons regularly employed for not more than 24 hours per week and students employed during the school vacation period*. A final certificate must await the submissions of the parties on the existence of a history of part-time lab employees.

14. We recognize, of course, that the creation of a separate laboratory bargaining unit (or perhaps two) is somewhat anomalous and inconsistent with the Board's usual practice. But that anomaly can be traced, fundamentally, to the parties' agreement before the earlier panel of the Board to exclude laboratory employees from the production bargaining unit when, on the basis of community of interest, they really should have been included.

1285-86-R Great Lakes Fishermen and Allied Workers' Union, Applicant, v. S. Catrini Fisheries Inc., Respondent

Practice and Procedure - Pre-hearing Vote - Applicant failing to attend meeting with labour relations officers - Applicant aware of meeting and given warning concerning non-attendance - Certification application dismissed

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *D. A. MacDonald* and *D. A. Patterson*.

DECISION OF THE BOARD; September 16, 1986

1. This is an application for certification in which the applicant has requested a pre-hearing vote.
2. The name of the respondent is amended to read: "S. Catrini Fisheries Inc.".
3. In accordance with the Board's usual practice, by order dated July 31, 1986, the Board appointed Labour Relations Officers to confer with the parties in relation to matters arising out of the pre-hearing vote application. The Officers so appointed scheduled a meeting with the parties August 15, 1986. At the outset of the meeting, it was learned that the respondent had not been notified of the application or meeting. Accordingly, the Board fixed a new terminal date and, by order dated August 22, 1986, appointed another Officer to meet with the parties. The applicant failed to attend that meeting held on September 4, 1986.
4. Counsel for the applicant has written to the Board submitting that the failure of the

applicant to appear was “due to a series of inadvertent coincidences” and requests the Board to direct the vote to be held on the basis of the information filed. The applicant was aware of the date, place and time of the meeting. Furthermore, notice of the Officer’s meeting, sent to the applicant and its counsel on August 22, 1986, for the meeting scheduled for September 4, 1986, states as follows:

Failure of the applicant to attend the meeting in this case, either in person or through its representative, will result in rejection by the Board of the application.

5. Accordingly, the application is hereby dismissed.
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0497-84-R Canadian Paperworkers’ Union and its Locals 36, 311 and 1112, Applicant, v. **Somerville Belkin Industries Limited**, Tencorr Packaging Inc., Belkin Packaging Ltd., and Canadian Folding Cartons Limited, Respondents

Evidence - Related Employer - Sale of a Business - Earlier panel directing respondent to produce evidence material to application - Witnesses called by respondent giving no direct evidence concerning formation of respondent - Hearsay evidence failing to comply with Board direction - Further direction to tender evidence

BEFORE: *D. E. Franks*, Vice-Chairman, and Board Members *P. J. O’Keeffe* and *F. W. Murray*.

APPEARANCES: *Harold F. Caley*, *Norman L. Jesin*, *Gary Buccella* and *Michael Hunter* for the applicant; *D. Jane Forbes-Roberts* and *D. Daugharty* for Somerville Belkin Industries Limited; *Howard Levitt* and *R. Ellery* for Tencorr Packaging Inc.; *Bruce Binning* and *Gerry Jansen* for Belkin Packaging Ltd.

DECISION OF THE BOARD; September 23, 1986

1. This is an application under sections 63 and 1(4) of the *Labour Relations Act* made by the Canadian Paperworkers’ Union (“CPU”) on its own behalf and on behalf of its Locals 36, 311, and 1112. The named respondents are: Somerville Belkin Industries Limited (“Somerville Belkin”), Belkin Packaging Ltd. (“Belkin”), Tencorr Packaging Inc. (“Tencorr”), and Canadian Folding Cartons Limited (“CFC”). Somerville Belkin is a wholly-owned subsidiary of Belkin.

2. By a decision dated May 24th, 1985 another panel of this Board made the following direction to the respondents in paragraph 16:

... at which time the respondents will be required to produce witnesses to adduce all facts within their knowledge that are material to the successor rights and related employer allegations. ...

3. At the hearing in this matter the respondents Tencorr and Belkin tendered a copy of the “corrugated financing agreement” together with its appendices. The respondents also tendered *viva voce* evidence through two witnesses, Mr. Ellery and Mr. Jansen. These witnesses reviewed, affirmed and expanded upon the Statement of Fact document which had been tendered by the respondents and discussed in the previous Board decision. At the conclusion of the cross-examination of each of these witnesses, counsel for the applicant served notice on the other parties to the proceedings that he felt that the witnesses were not in a position to comply with the Board’s decision

of May 24th, 1985 referred to above. At the conclusion of the case for the respondents, counsel for the applicant formally requested the Board to direct that the respondents comply with the duty imposed by subsection 5 of section 1 and subsection 13 of section 63 of the Act.

4. Counsel for the respondents took the position that they had complied with the previous decision of Mr. MacDowell and the order made therein, and further that decision sets out what for them constitutes compliance with section 1(5) and 63(13) in the present case.

5. Both of the witnesses called by the respondents in this matter, Mr. Ellery and Mr. Jansen were not involved in the setting up of Tencorr. Mr. Ellery who is the vice-president and general manager of Tencorr since its conception in December of 1983 had previously been employed by Atlantic Packaging. He could thus give, and in fact did give extensive evidence concerning the present relationship between Belkin and Tencorr. However, he could give no direct evidence concerning any of the material events prior to the setting up of Tencorr.

6. Mr. Jansen who is the general manager of Belkin's Corrugated Division at Cartwright Avenue has only been with Belkin since September 10th, 1984. Like Mr. Jansen he gave extensive evidence concerning the current arrangements. However, prior to his employment by Belkin he was employed by Consolidated-Bathurst. The only evidence he could give concerning the formation and the arrangements leading up to the formation of Tencorr was the result of a conversation he had with Mr. Belkin.

7. In neither the case of Mr. Jansen nor Mr. Ellery was any attempt made by the respondents to adduce additional evidence which might be admissible hearsay under the exceptions to the exclusionary rule which were as a result of their attempting to apprise themselves of events which occurred prior to their employment with the respective respondents. The evidence that was tendered in that regard was the corrugated financing agreement and its appendices referred to above. In sum then any evidence that was tendered by these two witnesses with respect to events surrounding the formation of Tencorr would have been plain and simply hearsay evidence.

8. The respondents take the position that the tendering of such hearsay evidence complies with the Board's previous decision in this matter, that is, they rely on the analogy discussed at great length in the previous decision with the pre-trial discovery process discussed in the Board's *Canada Cement Lafarge Ltd. and Point Anne Quarry Company* case [1977] OLRB Rep. Jan. 5. They argue that the tendering of such hearsay evidence is adequate in a discovery proceeding and, accordingly, is appropriate in the present proceeding since the Board in paragraph 13 of its decision of May 24th, 1985 in this matter specifically approved of the discussion in the *Canada Cement Lafarge Ltd.* case. Thus, the respondents ultimately argue that as long as their witnesses are prepared to apprise themselves of the facts, whatever is tendered by them in the giving of their evidence has to be accepted as evidence by this Board notwithstanding the fact that it might be hearsay evidence. Thus, for instance, when Mr. Jansen spent time discussing with Mr. Belkin the formation and the transactions relating to the formation of Tencorr that evidence is admissible evidence and is sufficient to comply with the Board's previous direction in this matter.

9. In our view, the argument put forward by counsel for the respondents involves a serious misreading of both the *Canada Cement Lafarge* case and the previous decision in this matter. In both decisions the Board quite carefully enunciated that any analogy with the discovery process was not complete. In the *Canada Cement Lafarge* case the Board was addressing a much broader question about the procedures the Board ought to use in entertaining evidence in the face of the then new section 15 and section 55(13). In the previous decision in this matter, the Board was addressing the specific problem raised by the Statement of Fact filed by the respondents on which they intended, solely, to rely. Indeed, of critical importance in the Board's previous decision in this

matter is the paragraph immediately following the paragraph citing with approval in the *Canada Cement Lafarge* case:

14. While there may well be a distinction between “facts” and “evidence”, we do not think it is a helpful one in interpreting the onus provisions of sections 63(13) and 1(5) of the *Labour Relations Act*. Nor is the “discovery analogy” entirely parallel, appropriate, or applicable to proceedings before this Board. Of more assistance is the remedial thrust and purpose of the 1975 amendments, which, in our view, clearly require the respondents to produce witnesses to testify under oath as to the material facts of the transaction and relationships under examination, as well as the completeness and materiality of those facts. To say that this obligation can be satisfied by pleadings - which need not be substantiated - is to blunt the intent of the legislative change. Moreover, while it may be that section 1(5) is restricted to the question of common control or direction, section 63(13) clearly has no such limitations. Section 63(13) requires the respondent employers to adduce *all* of the facts of the transaction(s) between them said by the applicant union to constitute a transfer of all or part of a business. As noted above, that determination turns on a careful analysis of all of those facts, having regard to the purpose and ambit of section 63, and in the absence of a more complete disclosure of the “commercial facts”, we are hesitant to limit the obvious effect of section 63.

10. It is precisely the facts in the realm of labour relations that the respondents have not tendered any evidence. Neither witness could give direct evidence or be cross-examined on the considerations which went into the setting up of the present series of arrangements. Yet it is precisely the evidence in that realm which, as the Board has pointed out in its previous decision, is the evidence that is of most concern to the Board in assessing the application of section 63 and section 1(4) of the Act. In our view, it is precisely that area which the applicant is entitled to enquire into when the applicant examines the witnesses tendered by the respondents pursuant to section 1(5) and 63(13). In such a critical area of this inquiry, neither the applicant nor this Board ought to be content with anything but the best available evidence. As we have noted, the hearsay sought to be introduced does not fall within any of the exceptions to the exclusionary rule; it is simply statements in the nature of rumours upon which no meaningful cross-examination can be conducted.

11. Accordingly, we are of the view that the applicant’s motion in this matter should succeed and we therefore direct that the respondents tender evidence concerning the events leading up to and the formation of the corrugated financing agreement and the setting up of Tencorr Packaging Inc. The Registrar is directed to list this matter for continuation of hearing.

**0434-85-M Sheet Metal Workers International Association Local 537, Applicant,
v. S. N. Ventilation Heating Limited, c.o.b. as Steve’s Sheet Metal Company,
Respondent**

Construction Industry Grievance - Damages - Whether genuine sub-contract or attempt to avoid collective agreement - Board considering employer’s good faith in making sub-contract arrangement and union’s knowledge - Refusing to go behind “sub-contract” in particular circumstances - Damages assessed for hours lost by union members

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *R. W. Pirrie* and *W. F. Rutherford*.

APPEARANCES: *Stanley Simpson* and *O. Pettipas* for the applicant; *Sveto Dojcinovic* for the respondent.

DECISION OF THE BOARD; August 27, 1986

1. This is a referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*.
2. In companion files 3437-84-R and 3438-84-R the Board dismissed applications under sections 63 and 1(4) with respect to Gerhard Schaefflein and G. S. Sheet Metal, and accordingly found that those respondents were not bound by the applicant's collective agreement with the respondent Steve's Sheet Metal. The evidence disclosed, however, that much of the work taken on by G. S. Sheet Metal was completed by Steve's Sheet Metal itself, when Gerhard Schaefflein, for personal reasons, returned to Germany. It remains in the instant application, therefore, to determine what damages are payable by the respondent Steve's Sheet Metal on the 4 jobs in question, all of which indisputably fall within the "jurisdiction" of the collective agreement.
3. The evidence now discloses that much of the work in question was performed on a "subcontract" basis by Mueller Sheet Metal, and much of it by Steve Dojcinovic, the owner of Steve's Sheet Metal, himself. With respect to the former, Mr. Dojcinovic was approached by Mr. Mueller, who has been the proprietor of a registered company called "Mueller Sheet Metal" since 1977, and was asked if he would subcontract some fabrication work to him. Mr. Dojcinovic was aware of the restrictions under the collective agreement with respect to subcontracting, the relevant provision of which provides:

ARTICLE 9 - SUB CONTRACTS

9.1 When subcontracting the employer agrees that any and all of the acknowledged work herein contained in the Clause covering Trade Jurisdiction in the respective Appendix must be subcontracted to an employer who is a signatory to this Provincial Agreement, providing such subcontractors are available.

Mr. Dojcinovic accordingly told Mr. Mueller that he would subcontract work to Mueller Sheet Metal if he were able to get a collective agreement with the applicant union.

4. Mr. Mueller consequently attended at the office of the applicant. He explained to the Union that he was setting up in business, and would like to become a Union member and sign a collective agreement. He was asked a few questions about his intentions for the business, after which the Union signed him to a collective agreement. With respect to becoming a Union member, however, the Union told him he would have to wait until he actually started up a shop, and the Union would look at the situation then. Mr. Mueller then took his collective agreement back to Mr. Dojcinovic, and Mr. Dojcinovic agreed to give him some of the fabricating work in Mr. Dojcinovic's shop. Mr. Mueller quoted an hourly rate, and was paid on that basis, without deductions (all of the normal matters subject to payroll deduction were the responsibility of Mr. Mueller). Mr. Mueller would bring his own tools into the shop of Steve's Sheet Metal, would be handed a work order by Mr. Dojcinovic, and would be left by Mr. Dojcinovic (who was frequently out of the shop doing residential work) to complete the work.
5. The Union argues that this arrangement with "Mueller Sheet Metal" did not in fact constitute a true "subcontracting", but rather was simply a scheme by Steve's Sheet Metal to avoid the application of the collective agreement. The Union accordingly claims damages from the respondent Steve's Sheet Metal for all hours worked by Mr. Mueller.

6. The Board recognizes that it is not unusual for tradesmen to set themselves up as purported "independent contractors", and to be treated as such on the payroll by those engaging their services, under circumstances in which the Board would not necessarily find them to be "independent contractors" at all. See, e.g., *Montreal Locomotive Works*, (1947) 1 D.L.R. 161; *Babco Plumbing Services*, [1985] OLRB Rep. Dec. 1693. In the present case, however, none of us are of the view that we ought to go behind the "subcontracting" arrangement upon which Mr. Dojcinovic claims to have relied. As much as Mr. Dojcinovic has made his dislike for the collective agreement apparent throughout his testimony, we do find that he was acting in good faith in demanding from Mr. Mueller that he obtain a collective agreement from the Union before he could receive any work from the respondent. The Union knew that Mr. Mueller was not set up in his own shop at that point, and in fact withheld membership from him on that basis. As the Union's business agent in his testimony acknowledged in hindsight, the Union might well have held back on the signing of a collective agreement until Mr. Mueller showed signs of opening his own shop as well. We understand why the Union would be anxious to sign any potential contractor to a collective agreement as early as possible, but we also have to consider what is fair to all of the parties involved in the present inter-relationship. If the Union is held to the "subcontract" arrangement that ensued, they still have a remedy against Mueller Sheet Metal, who asked to be signed to the collective agreement. If the Board goes behind the "subcontract" arrangement to place all of the liability on Steve's Sheet Metal, the latter company has no recourse against anyone. And it is Mueller Sheet Metal that has in fact been paid by Steve's for the work in question. Having regard to the good faith of Mr. Dojcinovic in requiring, as he saw it, that the terms of the "subcontracting" clause of the collective agreement be adhered to, *and* to the knowledge that the Union had of the situation (sufficient knowledge to hold back from Mr. Mueller a Union card), we are not prepared to go behind that arrangement and examine its status, with a view to possibly placing the liability for the Mueller hours on Steve's Sheet Metal. While the combination of an innocent representation on the Union's part and innocent reliance upon it on the respondent's part has led us to this conclusion in the present case, the respondent should be aware that any future "subcontracting" arrangements would, in light of the knowledge he now has of the Union's position, be subject to closer scrutiny under the tests articulated by the Board in the past.

7. We are in fact troubled as well by the applicant's conduct on the question of admitting Mr. Dojcinovic himself into membership (which might possibly have permitted Mr. Dojcinovic some latitude in taking advantage of the "owner/operator" allowance which exists in this industry, with respect to owners working with the tools). The respondent did not, however, adduce any direct evidence before the Board of what that allowance is, and the Board is not therefore in a position to assess the degree to which it might have been of assistance to Mr. Dojcinovic, had the Union stood behind its original undertaking to admit Mr. Dojcinovic into membership for the initiation fee of one dollar. While we are all concerned that the Union did not at the point of the undertaking make it clear to Mr. Dojcinovic the time frame for hiring Union members in order for his own initiation-fee waiver to have effect, the evidence does disclose at least one early instance of "I.C.I." work, in which Mr. Dojcinovic should properly have hired a Union man. Had he done so, he would still have been able to take advantage of the Union's initiation-fee waiver at that time. On an assessment of all of the evidence, therefore, we are not of the view that Mr. Dojcinovic is entitled to relief for the "I.C.I." hours which he or his brother (also a part owner) have performed.

8. The records of the respondent also show a number of hours worked on the job in question by members of the Union, and the applicant makes no claims in that regard. Mr. Dojcinovic does, however, admit to work being performed in addition by a non-member, Alec Palmer, and the Union is entitled to damages for his hours (estimated by Mr. Dojcinovic at 20 plus 8 hours).

9. There was also a second "subcontractor" involved, Joe Kester, but Mr. Dojcinovic

claims that Mr. Kester worked only for G.S. Sheet Metal. That does not on the surface appear likely, in light of the role of Steve's Sheet Metal in carrying out these jobs for G.S., and the respondent produced no documentary evidence to substantiate its claim. Nor is there any Union involvement in the arrangement with Kester Sheet Metal on which to base a claim of estoppel. Mr. Kester would not in any event meet the requirements for eligible subcontractors under Article 9 of the collective agreement, and we must find that it is the respondent Steve's Sheet Metal that is responsible for the hours worked by Mr. Kester (conservatively estimated at 16).

10. The Board accordingly finds the assignment of work to have been in violation of the collective agreement with respect to the following hours:

Steve Dojcinovic	55 hours
Ioci Dojcinovic	24 hours
Alec Palmer	28 hours
Joe Kester	<u>16 hours</u>
	<u>123 hours</u>

11. The evidence is that the applicant had members qualified and available to perform this work. In the result, the respondent Steve's Sheet Metal is directed to pay forthwith to the applicant on behalf of its members the amount of 123 x \$22.73 (the collective agreement rate, including all contributions), being \$2,795.79.

1406-85-R United Steelworkers of America, Applicant, v. Trim Trends Canada Limited, Respondent, v. Group of Employees, Objectors

Certification - Membership Evidence - Chief union organizer directing other organizers not to use two-tier initiation fee as organizing tool - Whether employees misled about effect of different initiation fees

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *R. J. Gallivan* and *W. F. Rutherford*.

APPEARANCES: *Keith Oleksiuk* for the applicant; *Walter Thornton* for the respondent; *Michael G. Horan* for the objectors.

DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; September 24, 1986

1. This is an application for certification. The applicant filed evidence of membership on behalf of more than 55 per cent of the employees in the bargaining unit. There were also filed statements of desire in opposition to the application signed by a majority of employees in the unit. On March 20, 1986 a majority of this Board panel issued a decision concluding that the statements could not be accepted as a reliable indicator of the voluntary wishes of the union members who had signed them. Accordingly, the majority declined to exercise the Board's discretion under section 7(2) of the *Labour Relations Act* to direct the taking of a representation vote.

2. Following the release of the Board's decision of March 20, 1986 the matter came on for hearing before a differently constituted panel of the Board to inquire into certain allegations raised

by the objectors. These allegations center around a claim that organizers for the union told employees that while they currently could join the union for one dollar it would later cost them ten dollars to do so. Having heard the representations of the parties, the other panel determined that it would be more appropriate to have the allegations heard by this panel. The matter was then re-scheduled for hearing, at which time this panel of the Board heard the evidence and representations of the parties with respect to the allegations.

3. Section 1(1)(l) of the *Labour Relations Act* defines a “member” of a trade union for the purposes of the Act as including a person who has applied for membership in the union and “has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union”. Many unions have a regular initiation fee higher than \$1.00. Indeed some of the construction trade unions have initiation fees of hundreds of dollars. So as to assist in organizing employees, frequently during organizing campaigns unions do not require that employees pay the regular initiation fee, but only the one dollar required by the Act. This may result in a situation where an employee can become a member of a trade union for one dollar during an organizing campaign, but if he joins later he will be required to pay a higher amount. Many trade unions, however, have adopted a practice of allowing employees who did not join the union during the organizing campaign a period of time after the union has been certified in which to join the union for a one dollar initiation fee. It is perhaps worth noting that there is no certainty that an employee will be required to join a certified trade union. Although the Act permits collective agreements to require union membership as a condition of employment, it only mandates that on the request of the trade union a collective agreement requires that all employees pay regular dues to the union. Such a provision would oblige a non-member of the union to pay regular monthly dues but not to join or pay an initiation fee to the union.

4. From time to time trade unions have made use of a lower initiation fee as an organizing device. This generally involves urging employees to join the union now for one dollar, rather than later when they will be required to pay a much higher amount. The Board has indicated its concern about situations where this is done, particularly where employees may be left with the impression that once the union is certified they will automatically have to join the union at the higher amount. The Board’s concern is that employees may join the union during the initial organizing campaign not because of any real desire to be represented by the union, but rather to avoid the risk of having to pay a higher initiation fee if the campaign is successful. The Board has made it clear that it does not prohibit the lowering of the amount of an initiation fee for the purposes of an organizing campaign. What it requires is that union organizers not seek to mislead employees about the effect of the different initiation fees, and that employees who do not join the union during the organizing campaign be provided a reasonable opportunity to join for the lower fee after it has been determined that the union will be certified. This point was expressed as follows in the *Haughton Graphics Limited* case, [1983] OLRB Rep. Sept. 1464 at 1467:

The Board accordingly sent a clear signal that a “special” initiation fee to eliminate the financial impediment to organizing would continue to be acceptable; but not to the point where the same device may be held out as the threat of a “penalty” to those employees who would refrain from joining prior to the union becoming certified. The union, in other words, must not use this organizing tool in such a way as to cause the Board to doubt whether employees have joined the union of their own free choice, or simply as insurance to avoid the risk of being required to pay the full amount of the initiation fee if the union is successful. The proper question is whether the employees wish to become part of the trade union or not, and organizing campaigns ought to be won or lost on this basis. Any two-level system of initiation fees causes a problem for the Board so long as the higher level is made to apply *before or immediately upon certification* of the trade union. In order to prevent this organizing device from being a distorting factor in assessing employees’ true wishes, the two-tiered system must allow all employees employed at the time of the organizing campaign a reasonable opportunity to join for the lower fee *after* it has been

determined whether the union will be certified. This is recognized to be already the practice of at least certain of the trade unions in the province, and conformity to it by others would seem to be no more than the Act requires.

5. The constitution of the applicant trade union was not put in evidence. However, the constitution was referred to in the testimony of certain of the witnesses called by the union, most notably Mr. Everett Roberts. Mr. Roberts is employed as a mechanic by another company where he is the President of a Local of the United Steelworkers of America. At various times Mr. Roberts has taken a leave of absence from his regular employment and worked as a paid organizer for the United Steelworkers. According to Mr. Roberts, the union's constitution requires that employees joining the union after a first collective agreement has been signed pay an initiation fee of ten dollars. Mr. Roberts indicated that he understood that any time prior to the signing of a first agreement, employees joining the union need pay only one dollar.

6. Mr. Roberts described himself as the "chief organizer" in the campaign to get employees of the respondent to sign union cards. He was assisted by a number of other non-employees of the respondent who took time off their regular jobs to participate in the organizing campaign. Approximately ten employees of the respondent also served as "in-plant" organizers.

7. Partway through the campaign there arose an issue as to whether employees who did not join the union during the organizing campaign would later have to pay \$10.00 to do so. The first reference in the evidence to a discussion about different initiation fees was on or about May 2, 1985, approximately three weeks into the campaign, when Mr. Roberts met with a group of employees at one of their homes. At the meeting one of the employees referred to the fact that the son of employee Mabel Yokom was considering joining a construction union and that it would cost him over \$300.00 to join. Ms. Yokom testified that either she or another employee asked Mr. Roberts what it would cost to join his union to which he replied that it would be one dollar to join now, and that after the union got in it would be ten dollars. Mr. Roberts testified that what he said was that the fee was one dollar, but that the applicant's constitution provided that after a contract was signed, all new employees would pay a ten-dollar initiation fee. It is of some interest that the collective agreement administered by the Local of which Mr. Roberts is president does not require union membership as a condition of employment. Indeed, it was Mr. Roberts' testimony that he understood that while the payment of dues could be made compulsory, the same was not true for actual union membership.

8. The evidence indicates that at no point did Mr. Roberts try to use the ten-dollar as opposed to one-dollar initiation fee as a "selling" point to get employees to sign union cards. It is clear, however, that there was some discussion of the matter among employees, perhaps as a result of the discussion on May 2nd. Mr. Roberts became aware of the fact that the matter was being discussed by employees. Most of the other "outside" organizers joined the campaign in late July or early August 1985. Before they started, they met as a group with Mr. Roberts. At this meeting Mr. Roberts reviewed the campaign to date. Because he was aware that they might be asked questions about the differing initiation fees, Mr. Roberts raised the matter at the meeting. Mr. Roberts testified that he referred to the applicant's constitution, and indicated that while the organizers were to answer employee questions on the matter, they were not to use the ten-dollar initiation fee as an organizing device.

9. One of the employees visited by Mr. Roberts was Mrs. Chris Fluney. Mr. Roberts testified that Mrs. Fluney was one of the last employees visited because it was understood that she was opposed to the union. Mr. Roberts described to Mrs. Fluney certain benefits he claimed employees would receive if represented by the applicant. Mrs. Fluney, in turn, indicated that she did not wish to join the applicant, but that Mr. Roberts could call on her again after she had a chance to think

about the matter. Mrs. Fluney testified that during the discussion she asked how the union was doing, to which Mr. Roberts replied that a majority of employees had signed up. Approximately one and a half weeks later, Mr. Roberts returned to see Mrs. Fluney. This time Mrs. Fluney's husband was also at home. During their discussion Mr. Fluney, and perhaps also Mrs. Fluney, asked what it would cost to join the union now or later. Mrs. Fluney indicated that the topic was raised because she had heard it being discussed at work. According to Mrs. Fluney, Mr. Roberts replied that it would be one dollar to join now and ten dollars later. Mr. Roberts testified that in response to the question, he explained that the only extra fee would be ten dollars for new members after a contract had been signed. He also stated that he explained that this was related to the union's constitution. When called by counsel for the objectors in reply, Mrs. Fluney again indicated that she recalled Mr. Roberts saying simply that it would be one dollar now and ten dollars later when the union came in. Mrs. Fluney did not sign a union card.

10. One of Mr. Roberts' principal assistants during the organizing campaign was Mr. Steve Banks. Mr. Banks is employed by a company in Orillia where is the President of a Local of the United Steelworkers. Mr. Banks was among those organizers directed by Mr. Roberts not to use the ten-dollar initiation fee as an organizing device. Mr. Banks visited a number of employees, one of whom was Miss Nora Green. Mr. Banks met with Miss Green three times at her home. Miss Green testified that it was hard for her to recall her discussions with Mr. Banks since they occurred some time ago, and were not important to her. Miss Green stated that she recalled that at their first meeting, Mr. Banks advised her that it would cost her one dollar to join the union now, but twelve dollars when the union got in. Mr. Banks denied having discussed a twelve-dollar initiation fee. According to Mr. Banks, Miss Green asked him if there would be a special fee to join the union later, and he replied that after the union was certified and had negotiated a collective agreement, and someone then wanted to join the union, the initiation fee would be ten dollars. Given the clarity with which Mr. Banks gave his evidence, and Miss Green's indication that she had trouble recalling her discussion with Mr. Banks, we are prepared to accept Mr. Banks' version of the conversation, namely that Miss Green raised the issue of the cost to join the union later, and Mr. Banks indicated that after a collective agreement was negotiated it would cost ten dollars. Miss Green did not sign a union card.

11. Another individual who assisted with the organizing campaign was Miss Vivian Barrow. Miss Barrow is the President of an office and technical Local of the United Steelworkers in the Toronto area. Miss Barrow joined the organizing campaign after most of the other organizers. She was not present at the meeting where Mr. Roberts advised the organizers that they might be questioned about the higher initiation fee, and that if it were, they were to answer questions about it but not to use it as an organizing device. Miss Barrow signed as the collector on six of the union's membership cards. Among the employees visited by Miss Barrow was Mrs. Isobel Solomon. Miss Barrow visited Mrs. Solomon on three separate occasions. Miss Barrow and Mrs. Solomon appear to have gotten along well together and discussed a range of different topics. According to Mrs. Solomon, in their final meeting Miss Barrow indicated that the union was in and advised her that she might as well pay a dollar now, because she would have to pay ten dollars later. Mrs. Solomon directly referred to this aspect of her discussion with Miss Barrow twice. The first time, she said "The last time (i.e. on her last visit) she (Miss Barrow) said I might as well give her the one dollar now because it would cost me ten dollars later". Subsequently, Mrs. Solomon stated, "She said it was going to cost me ten later so I might as well give her the one now". When being cross-examined, Mrs. Solomon was asked if she had asked Miss Barrow about the ten dollars. Mrs. Solomon replied that she did not think so, but that rather Miss Barrow "just told me". Mrs. Solomon did not sign a union card.

12. Miss Barrow testified that where she works, union membership and a ten-dollar initiation fee are conditions of employment. She also stated that it was her understanding that a one-dollar initiation fee in effect during an organizing campaign continues until the meeting where employees select a negotiating team. Subsequently she stated that she understood the one-dollar fee continued until the employer started deducting union dues. Miss Barrow testified that she advised Mrs. Solomon that the union campaign was going well, and the union was close to the point where it could apply to be certified. Miss Barrow denied discussing a ten-dollar initiation fee with Mrs. Solomon. Miss Barrow stated that she did not raise the one-dollar/ten-dollar difference, adding "I'm sure she (Mrs. Solomon) could have heard that from anybody, but she did not hear that from me". Both Mrs. Solomon and Miss Barrow came across as credible individuals. One of them, however, must be mistaken. On balance, we are prepared to accept the testimony of Mrs. Solomon. She appeared to have a good recollection of the details of her discussions with Miss Barrow. Further, unlike the other outside organizers, Miss Barrow did not have the advantage of Mr. Roberts' caution against referring to the different initiation fees as a way to try to get employees to join the union.

13. The only bargaining unit employee organizer whose conduct was put in issue was Ms. Mabel Yokom. Partway through the organizing campaign Ms. Yokom began to actively assist the union. She signed several employees into union membership. Ms. Yokom at times talked about the union with another employee, Mrs. Mary Fasciano, a known opponent of the union. Mrs. Fasciano testified that she knew Ms. Yokom to be a union supporter, but was unaware of Ms. Yokom's role in the organizing campaign. She stated that she had once seen Ms. Yokom with a single union card. Mrs. Fasciano testified that on one occasion when she and Ms. Yokom were discussing the union, Ms. Yokom indicated that if she joined the union now, it would cost her one dollar, and if the union came in it would cost her ten dollars. Later, when being cross-examined by union counsel, Mrs. Fasciano agreed with the proposition that at the time of Ms. Yokom's comments, Ms. Yokom was not asking her to join the union. Mrs. Fasciano added the comment that "she (Ms. Yokom) never asked me to sign a card or anything like that". It was Ms. Yokom's testimony that she never talked about the cost of joining the union with Mrs. Fasciano because she knew Mrs. Fasciano was opposed to the union. On balance, however, we believe that Ms. Yokom likely did make the comment in question to Mrs. Fasciano, but does not now recall having done so. Mrs. Fasciano never did join the union.

14. In determining this matter we see no difficulties with the membership evidence collected by Mr. Banks. The only evidence with respect to his conduct during the organizing campaign concerned Miss Green. As indicated above, we are satisfied that Miss Green asked Mr. Banks about the cost of joining the union later and he replied that after a collective agreement was negotiated it would cost ten dollars. There is nothing of concern in this response. We also have no difficulties related to the comment allegedly made by Ms. Yokom to Mrs. Fasciano. It is clear from Mrs. Fasciano's evidence that Ms. Yokom referred to the ten-dollar initiation fee in the course of a friendly discussion with someone she knew to be an active opponent of the union and was not part of an attempt to get Mrs. Fasciano to join the union. No employee came forward to indicate that while attempting to get them to join the union Ms. Yokom made any reference to a ten-dollar initiation fee.

15. The situation with respect to Mr. Roberts is somewhat more complex. It is clear on the evidence that Mr. Roberts did not try to use the regular ten-dollar initiation fee as a "selling point" in the campaign, and indeed he instructed most of the other organizers not to use it in such a way. We found Mr. Roberts to be a credible witness. We have no doubt that it is his recollection that when asked by Ms. Yokom and Mrs. Fluney about the cost of later joining the union he said it would be ten dollars after a collective agreement was signed. However, Ms. Yokom and Mrs. Flu-

ney both recalled Mr. Roberts' response as being simply one dollar now and ten dollars later, without an express indication that the "later" was after a collective agreement had been executed. Although the matter is far from clear, given the large number of employees Mr. Roberts probably talked to during the organizing campaign, and the possibility that he would not be able to accurately recall what he said to each one, we believe that Ms. Yokom and Mrs. Fluney's recollection of Mr. Roberts' comments were probably more accurate.

16. We thus have a situation where Mr. Roberts, the chief organizer in the union campaign, did not wish to use a two-tier initiation fee as an organizing tool, directed other organizers not to do so, and did not himself raise the issue with employees. He did not seek to mislead employees. However, when responding to a question raised by two employees, Mr. Roberts indicated that it would cost ten dollars to join the union later without specifying that "later" was after a collective agreement had been signed. There exists the reasonable possibility that Mr. Roberts may have responded in a like manner if the question was raised by other employees. This, in turn, raises a question as to whether the membership evidence collected by Mr. Roberts is unreliable because employees might reasonably have joined the union simply as insurance against the risk of having to pay the full initiation fee later if the union organizing campaign was successful. It is our view it does not. The nine-dollar difference between the applicant's regular ten-dollar initiation fee and the one-dollar fee during the organizing campaign was considerably less than in the other cases we were referred to. Further, it is clear that at no point did Mr. Roberts ever say or in any way indicate that it would be mandatory for employees who did not join the union during the organizing campaign to subsequently join the union at a ten-dollar initiation fee. In these circumstances, we feel it highly unlikely that any employee would have signed a union card because of the way Mr. Roberts responded to a question about initiation fees.

17. This then brings us to the situation of Miss Barrow. As indicated above, we are satisfied that on at least one occasion Miss Barrow herself raised the matter of the ten-dollar initiation fee. Further, she did it in a context that would have left the impression that if the employee did not pay a dollar now she would be required to pay ten dollars later. Given Miss Barrow's apparent attempt to actively use the nine-dollar differential as a sales tactic and to leave the impression that employees would be required to pay the higher amount if they did not join the applicant during its organizing campaign, we believe it prudent to disregard the six cards obtained by her. Having done so, however, the applicant's membership evidence still relates to more than fifty-five per cent of the employees in the bargaining unit.

18. The final issue is whether, as claimed by the objectors, the matters dealt with in this decision, as well as the statements of desire in opposition to the application, should together cause the Board to exercise its discretion to direct the taking of a representation vote. We believe not. Apart from concerns relating to the membership evidence collected by Miss Barrow, which membership evidence we have discounted, we do not believe that employees would likely have signed membership cards due to statements relating to the applicant's initiation fee structure. Setting aside the membership evidence collected by Miss Barrow, the applicant's membership evidence rates to more than fifty-five per cent of the employees in the bargaining unit. The evidence with respect to the petition did not satisfy us that as of the terminal date these employees had voluntarily changed their minds about being represented by the union. In the result, we are not prepared to exercise our discretion and direct the taking of a representation vote.

19. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER R. J. GALLIVAN;

1. When the union made its application for certification more than a year ago, it filed membership evidence for 135 of the 232 employees in the bargaining unit, only seven more than the minimum required by the union to achieve its apparent goal of automatic certification without the necessity of having the extent of its real support tested through a secret ballot representation vote under section 7(2) of the Act. It is now agreed that six of those union membership cards sold by Ms. Barrow should be disregarded as having been tainted by the likelihood that she misled employees about the union's two-tier fee structure. The union's membership support is thus reduced to only one over the minimum. Nevertheless, by its decision not to order a vote, the majority is concluding that not even one of the remaining 129 cards obtained by any of the fifteen other union organizers could possibly be similarly tainted. Such a conclusion, in the face of numerous conflicts in testimony during the hearings before the Board, is neither credible nor logical, particularly when it is recalled that the majority of union organizers in this campaign were company, not professional union, employees and thus were far less experienced in the subtleties of labour law than Ms. Barrow, a union staff member for a year and the president of her own union local for six years. If the cards of such an experienced unionist are known to be tainted, the Board, to be objective, must surely conclude that on the balance of probabilities others are as well, and should resolve the doubt by ordering a vote.

2. And doubt there is. Indeed, the union's own chief organizer, E. Roberts, testified that virtually from the outset of his organizing campaign there were rumours throughout the plant about the union's two-tier fee structure. Other than a brief discussion with his outside organizers (who were a small minority of the collectors involved) about how to respond should any employee question the matter, he took no steps to counter the rumours or to clarify the confusion. He agreed under cross-examination that the \$1.00/\$10.00 fee structure could be interpreted as a threat by employees. Yet he apparently was satisfied to allow the threat to go unchallenged unless an employee specifically asked for clarification. One can conclude that so long as the confusion worked to the advantage of his campaign, he was content to allow employees to be misled. This sort of conduct by a union official has in the past led this Board to say (see *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288 at 290):

11. The Board's consistent policy in certification proceedings has been to require the highest standard of integrity on the part of union officers in the soliciting, gathering and presentation to the Board of documentary evidence in support of their application. Since that evidence remains confidential, is not subject to cross-examination and is the principal evidence on which the Board must rely in certification proceedings, it must be free of any cloud or taint. If, in view of the circumstances touching the soliciting and collecting of the membership evidence, the Board is left in doubt it may use its discretion to order a representation vote to resolve that doubt.

12. A union officer is under a duty to refrain from making false or misleading statements in the course of an organizing campaign. We find that the statement of Mr. Reilly, which might better be termed a half-statement, is blatantly, if not patently, misleading. His failure to explain his statement to the employees by omitting to say that the higher initiation fee would be forced on them only if the union could succeed in its application for certification, could thereafter successfully negotiate a union shop contract with the employer and would at that time be unable or unwilling to waive the higher initiation fee, leave this Board in some doubt as to whether employees for whom membership evidence was filed were in fact misled and therefore unable to fairly weigh the meaning of Mr. Reilly's statement as it might affect them. This raises some doubt as to whether the membership evidence filed is an expression of the true wishes of the employees.

3. There is no doubt in my mind, given the numerous conflicts in the evidence, that it is much more likely than not that a number of employees were misled by Mr. Roberts's failure to

clarify the issue and therefore signed union cards either under the implied threat or through misunderstanding of the true facts.

4. I dissented from the March 20, 1986 decision by the majority to disregard a petition in opposition to the union signed by 118 of the 232 employees in the agreed bargaining unit, including 24 employees who previously had signed union membership cards. The majority had concluded, incorrectly in my view, that a letter to the editor of a local newspaper from each of two local area residents who opposed unionization of the plant, had unduly influenced employees to sign the petition. The letters had raised the possibility that unionism could reduce the company's competitiveness and, by implication, weaken employees' job security. Those two residents were well known in the community - one having been a school bus operator and the other an insurance agent - both previously had been politically active at the local community level for many years and had been instrumental in attracting the plant to Dundalk in 1968; one was seen visiting the plant on one occasion during the summer of 1985 but neither had any relationship with the company. Nevertheless the majority concluded:

Given these facts, *a reasonable likelihood exists* that employees who had become union members subsequently signed the statements of desire not out of a truly voluntary change of heart about being represented by a trade union, but rather due to a fear that unionization would result in a threat to their job security.

[emphasis added]

5. I continue to disagree that the two community residents had the degree of influence on employees alleged by the majority. But if the majority believes that the 118 employees who signed the petition could be so impressionable and so easily misled that they signed for fear of their jobs then, at least for the sake of consistency and fair treatment if nothing else, they should similarly conclude *a reasonable likelihood exists* that the employees were misled over the question of the union's two-tier fee structure.

6. At the very least the cards obtained by Ms. Yokom should be disregarded. In her testimony under cross-examination she said that she was aware of the fee issue but had not been instructed by the union on how to answer questions about a two-tier structure and that, at least in the case of employees she had identified as being opposed to the union, she would not have answered their questions on the subject in any case because she did not trust non-union supporters. (She was aware of who some of the latter were from the T-shirt incident covered by the Board's March 20, 1986 decision.) Ms. Yokom was responsible for obtaining five union cards. It is not an unreasonable inference to draw from her evidence that she could not or did not explain the fee structure to those she recruited into the union. Thus her cards should be disregarded. Doing so would require the Board to order a vote under section 7(2).

7. As mentioned by the majority, the allegations concerning the union's fee structure came for hearing before a differently constituted panel of the Board. That other panel decided that it would be more appropriate to have those allegations heard by the same panel which had dealt with the petition. It came to that conclusion on the grounds that natural justice in the exercise of the Board's discretion to order a vote under section 7(2) of the Act required consideration of the total available evidence. In this case that evidence encompasses not only all the facts concerning the union's two-tier fee structure but also all the evidence elicited concerning the petition. Having regard for the totality of this evidence, it is abundantly clear to me that it is impossible for this Board to determine from the evidence before it whether or not on the terminal date a majority of these employees wished to be represented by a union.

8. The purpose of section 7(2) of the Act is to allow a vote to be held when the union's

majority status is unclear or in doubt. Here, some of the employees first signed union membership cards almost eighteen months ago, that is, more than five months before the union made its application to the Board in September 1985. There has thus been long delay. In the normal course, the Board attempts to assess the degree of union support as of the terminal date, September 17, 1985 in this case, rather than the Board hearing date. It does so in order that any subsequent delay for whatever reason will not disadvantage the union. However, in this case, the delay has been caused as much by the illegal means employed by the union to obtain some of its membership cards as by the need to assess the validity of the petition. The need to avoid disadvantaging the union is thus considerably blunted. The Board should therefore be cognizant that now, a year later, it is highly likely, indeed inevitable, that many employees will have changed their minds either for or against the union. This makes it abhorrent to now impose a union upon them and, contrary to the intent of the Act, will ill serve the promotion of "harmonious relations" between employees and the company. It is well to remind ourselves that the Act also promotes "collective bargaining between employers and trade unions as the *freely designated* representative of employees" (emphasis added because that part is so often forgotten).

9. After this much delay, a union application with membership cards only one over the minimum, a petition with many names overlapping union membership, reaffirmation of union support by some who signed the petition, union membership cards tainted by threats or obtained by having misled employees, unresolved conflicts in evidence - the cumulative doubt about the union's majority status begs for resolution through the mechanism provided by the Act. It is difficult to envisage a situation where a vote would be more appropriate than here.

1813-83-R; 2001-83-M International Brotherhood of Electrical Workers, Local 303, Applicant, v. **Twin Electric** and **Ermac Power & Control Ltd.**, Respondents

Related Employer - Sale of a Business - Application dismissed where no specific contract to acquire "key-man" services of an ongoing business - Key-man actually an employee in new company

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. H. Wightman* and *M. A. Ross*.

DECISION OF THE BOARD; August 27, 1986

1. These are consolidated applications under sections 1(4) and 63 of the *Labour Relations Act*, alleging that the respondent Ermac Power & Control Ltd. ("Ermac") is a "successor" employer to the respondent Twin Electric ("Twin"), or alternatively, that the two are "related employers". The Board by telegram-decision dated March 11, 1986 indicated that the circumstances of the delay in bringing the present applications were not of such a nature as would cause the Board to decline to issue a declaration under section 1(4). On the facts, however, the Board found the prerequisites to be present for neither a "sale" nor "related employer" finding, and the applications were dismissed. We now provide the reasons for that decision.

2. On the question of delay, it is necessary only to note that the Board will not be readily disposed to deny an applicant at least declaratory relief where the respondent, as here, took care to provide the Union with as little information as possible about the new venture (creating the

impression, at least, that it would be something very different from the old one), and where the Union does not ignore evidence of the respondent's existence so blatant as to indicate an attitude of not caring. See *Subito Contracting*, [1981] OLRB Rep. Oct. 1494; *The Great Atlantic & Pacific Company*, [1981] OLRB Rep. March 285.

3. Twin Electric was an electrical-contracting company begun by John Krause in the early 1970's. Alan McIntee, the principal of the respondent Ermac, was first employed by Twin in 1973, at that time as an apprentice electrician. Under Mr. Krause Mr. McIntee became a journeyman electrician, and stayed with Twin until 1979. In peak times Twin employed as many as 5 men in the field, although at other times the work force consisted solely of Mr. Krause and Mr. McIntee. The company's office was in Mr. Krause's home in Vineland, and Twin paid rent to Mr. Krause in that regard. In the later stages of the company Twin also paid Mr. Krause's wife a salary for secretarial services. Mr. Krause did all of the company's business promotion, estimating and bidding and, depending on the volume of work in hand, often would go into the field to perform the work as well. The work of Twin was covered by a collective agreement with the applicant.

4. In 1979 Mr. McIntee left Twin to try his hand at various businesses, but returned in 1980. In order to keep him, Mr. Krause paid Mr. McIntee a fixed salary at the journeyman rate, and began drawing a salary for himself at the same rate. By the early 1980's however, Twin was in serious financial difficulty, and struggling to keep going. Mr. Krause asked Mr. McIntee if he was interested in buying into the company, but Mr. McIntee, not seeing any real value in the company, never did so. Instead, Mr. Krause asked Mr. McIntee to lend him \$15,000 to try to keep the operation afloat, and Mr. McIntee agreed. That was not enough to salvage it, however, and after two successive 'loss' financial years, and the failure of the crop on the farm Mr. Krause had purchased, Mr. Krause was, by the end of 1982, forced to lay off even Mr. McIntee.

5. At that point Mr. McIntee decided that he would again attempt to build up a business on his own, consisting in part of the heat-conversion units with which he had had previous experience, but in the main of an electrical-contracting business. Mr. Krause, forced to wind up Twin at that stage, was interested in joining with Mr. McIntee in the new company, Ermac, but Mr. McIntee had concerns about what that would do to the "non-union" status of the business. The two men accordingly went together to see an experienced Toronto labour lawyer, and were advised not to involve Mr. Krause in the ownership of the business. That was enough for Mr. McIntee; he told Mr. Krause he could never be an owner in Ermac - although he could come and work for him any time he wanted.

6. Mr. Krause did that, as an estimator, shortly after Ermac became operational. Mr. McIntee also hired Denise Hildebrand, the former bookkeeper at Twin, to perform that function at Ermac. The Ermac office itself was located in downtown St. Catharines. Mr. McIntee had used the same law firm as Twin in his earlier business venture, and continued to do so. His accounting firm was different from Twin's. His bank was the same, but not the same branch. Mr. McIntee offered to pay Mr. Krause a salary based once again on the *Union* rate for a journeyman electrician (employees in the field got a non-union rate) partly, he testified, because that is what Mr. Krause had been used to living on, and partly because that was what he felt he would have to pay in order to attract a qualified estimator. Mr. McIntee began by drawing a salary at the same rate, but gradually increased his own draw as the business developed.

7. By the time of these proceedings, Ermac was able to list a substantial number of projects on which it had successfully bid. Some jobs were invited bids, some advertised, and with others Mr. McIntee, Mr. Krause, or another of Ermac's employees had seen a project commencing and Mr. McIntee followed up the lead. Some of the contacts were with people Mr. Krause and Mr.

McIntee had done work for at Twin; many others were not. A number of business contacts were brought in in particular by one employee, Chris Copeland, who had formerly had his own security-alarm business. Mr. Copeland in fact brought in by far the company's biggest project, a fire-alarm installation job at the Fallsway Motor Hotel. The actual promotion of the company is carried out by Mr. McIntee, in an aggressive way that Mr. Krause never did, and Mr. McIntee began his start-up in business by making a tour of all of the electrical consultants and main industrial users in the area.

8. Ermac has had as many as eight employees in the field at one time, none of them from Twin. Job applications are often addressed to Mr. Krause, as the main contact in the office, but then are referred to Mr. McIntee for decision (usually after consultation with anyone in the office who knows the individual). Ermac has bought its own equipment and vehicles (in its own colours), while Twin disposed of its remaining assets elsewhere (the odd piece of Twin equipment was borrowed by Ermac at start-up). Mr. McIntee is in the office at the beginning and end of every day, to co-ordinate the work, but the rest of the time is in the field supervising. Mr. McIntee likes Mr. Krause to remain solely in the office, and Mr. Krause does at least 70 per cent of the estimating. Mr. McIntee does the rest. On the estimates Mr. Krause works up, however, he does not even insert an hourly rate, unless Mr. McIntee gives him specific instructions to do so. Any significant estimate must be gone over by Mr. McIntee, although whoever is in the office, including Ms. Hildebrand, may sign it when it is typed and ready to go out. For banking purposes, however, only Mr. McIntee has signing authority.

9. In the first year of Ermac's operation, Mr. McIntee quickly used up his \$15,000 line of credit at the bank, and needed someone with security to sign as guarantor. Mr. Krause agreed to do that, and remained as the guarantor until the end of that fiscal year. Mr. Krause also loaned Mr. McIntee a total of \$5,000, at current rates of interest, and the loan has since been repaid. Mr. Krause owns no shares in Ermac, has no profit participation, and is neither an officer nor a director.

10. While the applicant argued that the above facts supported a finding under both section 63 or section 1(4), the "sale" aspect of the case is relatively simple. There was no disposition of anything from Twin to Ermac, and while *Doran Construction*, [1984] OLRB Rep. Aug. 1108, demonstrates that a sale of a business *can* take place through a specific contract to acquire the essential "key-man" services of an ongoing business, no such form of acquisition took place in the present case. The application under section 63 is accordingly dismissed.

11. The application under section 1(4) is more complicated. Clearly the intimate financial dealings between Krause and McIntee at Ermac raise a question of whether Krause does not have a participating interest in Ermac beyond that appearing on the surface. Having gone through a thorough investigation, however, and in particular having noted the history of the two men at Twin, we do not find it unworthy of belief that the guarantee and loan by Krause was *bona fide*, and done without any other form of interest (apart from his job) or equity in the company.

12. Notwithstanding that, however, the applicant argues that, looking at Twin and Ermac in terms of Krause and McIntee, nothing has changed, and the two operations remain "fundamentally the same". McIntee did the outside work and Krause the inside work at Twin, and that continues to be the case in Ermac. The two were advised by a lawyer that Mr. Krause could not be a partner in Ermac, the argument goes, "so they called him an employee".

13. The problem with that argument is that, after careful consideration of the evidence, and the answers given by the two men on the witness stand, the Board is satisfied that Mr. Krause is simply an employee in Ermac. His duties as an estimator are significant, but not particularly irre-

placeable (cf. *Braneida Mechanical*, [1981] OLRB Rep. Aug. 1102), and he has not been the key man in the acquisition of business generally. Mr. McIntee prefers to leave the bulk of the estimating and routine office work to Mr. Krause, who has been hired for that purpose, leaving Mr. McIntee free to ensure the efficient performance of the jobs themselves in the field. But Mr. McIntee clearly has overall responsibility for the office, the management, and the ultimate decision-making of the business itself, and is in the office at the start and end of each day in pursuance of that. And he is the one solely entitled to the benefit of the company's increased success. It clearly is, in short, Mr. McIntee's business. Twin Electric was, just as clearly, Mr. Krause's business. But Mr. Krause, effectively the sole owner and the individual to whom the applicant's bargaining rights attached through Twin, failed to make it, and now finds himself working as an employee for Mr. McIntee, who clearly has taken on the responsibility and initiative for the business of Ermac. This is a very different case from that of *Penka Carpentry Limited*, [1985] OLRB Rep. May 711, where the principal of the unionized company enlisted as nominal owner of a second company his semi-retired uncle, who made it clear he had no interest in running a business. That principal continued to be responsible for all of the things in the second company that he did in the first, and was understood to be an equal partner with the uncle in any profit.

14. Nor is the Krause/McIntee reversal of ownership roles in any way analogous to the husband/wife substitution which occurred in *Subito Contracting*, [1981] OLRB Rep. Oct. 1494. In that case, while the nominal ownership of the allegedly related companies changed from husband Guiliano to wife Phyllis, the Board noted the economic reality (now reflected in the *Family Law Act*, 1986) that both companies were carried on "for the benefit of the Guiliano-Phyllis household". In the present case, the change in position is real, and the "essential unity of organization", in the words of *Brant Erecting*, [1980] OLRB Rep. July 945, does not exist.

15. The application under section 1(4) is accordingly dismissed as well.

0278-86-R Ontario Nurses' Association, Applicant, v. Winchester District Memorial Hospital, Respondent, v. Group of Employees, Objectors

Certification - Settlement - Settlement concerning status of disputed individuals not signed by objecting employees who had intervener status - Fact that objecting employees not examined by Labour Relations Officer not rendering settlement void - Final certificate revoked pending Officer meeting with employees

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *W. H. Wightman* and *P. J. O'Keeffe*.

DECISION OF THE BOARD; September 30, 1986

1. By decision dated June 6, 1986, the Board appointed a Labour Relations Officer to inquire into and report back to the Board on the status of six disputed individuals and the composition of the bargaining unit in this application for certification. Pending the resolution of the issues in dispute, the Board granted the applicant interim certification.

2. An officer was duly appointed and met with the parties. The applicant and respondent settled the status of the disputed individuals prior to the scheduled inquiry.

3. This settlement was reported to the Board which issued a decision, dated July 24, 1986, in which the settlement was recorded and final certification granted.

4. The settlement was signed only by the applicant and respondent, although objecting employees had intervener status. In issuing its decision of July 24, 1986, the Board understood that the objecting employees had chosen not to participate in the settlement discussions and so stated in the decision.

5. Subsequent to the release of the July 24th decision, the Board received correspondence from two of the objecting employees, D. Jean Holmes and Nancy Sheldrick, who were also among the six disputed employees, in which the employees took issue with the statement in the decision that "Objecting employees were offered an opportunity to participate in the inquiry, but declined to do so". Both individuals stated that they did not sign the agreement because they had not been involved in the process of reaching the agreement and did not agree with it. They also expressed concern because they had not been examined as expected pursuant to section 1(3)(b) of the *Labour Relations Act*, the section under which their inclusion in the bargaining unit had been challenged.

6. The Registrar sent copies of these letters to the other parties, inviting their comments by September 5, 1986. The respondent and Holmes and Sheldrick responded to this invitation. Holmes and Sheldrick confirmed each other's version of the events which each had transmitted by their initial letters to the Board. The respondent confirmed that the officer had met with the applicant and respondent and that he had indicated that he would meet with Holmes and Sheldrick. The original letters of Holmes and Sheldrick confirm that the officer did meet with them but only after the settlement between the applicant and respondent had been reached.

7. After consideration of this matter, the Board is of the view that its July 24th decision was based on a partial misunderstanding of the events occurring at the meeting convened by the officer and has therefore reconsidered that decision.

8. In light of the concern expressed by Holmes and Sheldrick that they had not been examined, it should be explained that the settlement process is intended to expedite matters which might otherwise take considerably longer to resolve if an inquiry into the duties and responsibilities of disputed employees is held and then the parties wish to make representations before the Board with respect to the officer's report based on the inquiry. Of course, not all cases lend themselves to settlement. But where an officer can effect a settlement, the resolution of disputed matters permits the parties to get on with the business of collective bargaining and of developing a working relationship with each other in an atmosphere more conducive to such behaviour than where their relationship remains "interim" (although interim certification does permit the parties to begin collective bargaining). Any such settlement has the same force as a decision resulting from a full hearing before a panel of the Board. However, it is in the nature of the settlement process that it is informal, more informal than a Labour Relations Officer's inquiry and more informal still than a full Board hearing. The officer has a certain amount of discretion with respect to how he or she conducts the settlement discussions. For example, an officer is not required to speak with all the parties at the same time; rather, he or she may speak with one party, obtain the views of that party and then take those views to other parties, seeking a response. The officer acts as a conduit between or among the parties, in order to transmit their positions to one another, and as a facilitator by helping them negotiate a settlement. During this process, the officer is not required to conduct a mini-inquiry; rather, it is hoped that the settlement will negate the need for an inquiry. Therefore, the fact that the objecting employees were not examined does not in itself render the settlement process or the settlement void. Furthermore, the officer apparently did speak with the

objecting employees, informing them of the agreement reached between the respondent and applicant, and sought the views of the objecting employees. The officer's approach to reaching a settlement was quite acceptable.

9. The officer then asked the objecting employees to sign the Minutes of Settlement. He understood that the objecting employees did not sign the Minutes of Settlement because they no longer considered themselves a party. This view was evidently misconceived. The misconception was, unfortunately, transferred to the Board's decision of July 24, 1986. The Board was satisfied that the absence of the signature of a representative of the objecting employees was explained by the decision of the objecting employees not to participate in the settlement proceedings.

10. It now appears that objecting employees did not sign the Minutes of Settlement because they disagreed with them, not because they had withdrawn as a party or had declined an invitation to participate as a party. Under the circumstances, the Board concludes that the preferable course is to appoint again a Labour Relations Officer to meet with the parties as originally directed in the decision dated June 6, 1986.

11. We are aware that both the applicant and the respondent have reached a mutually satisfactory settlement and that they believed the matter to have been resolved. In particular, the applicant has been certified as the bargaining agent for the full-time and part-time employees in the bargaining units described in the decision dated July 24, paragraph 3. Today's decision means that that final certification for both units will have to be revoked pending the resolution of the issues in dispute and the applicant granted interim certification pursuant to section 6(2) of the *Labour Relations Act*.

12. This panel is not seized with this matter.

13. This matter is referred to the Registrar.

CASE LISTINGS AUGUST 1986

	PAGE
1. Applications for Certification	215
2. Applications for First Contract Arbitration	226
3. Sale of a Business	226
4. Union Successor Rights	226
5. Applications for Declaration Terminating Bargaining Rights.....	226
6. Complaints of Unfair Labour Practice	228
7. Applications for Consent to Prosecute.....	230
8. Applications for Religious Exemption	230
9. Applications for Consent to Early Termination of Collective Agreement	231
10. Jurisdictional Disputes.....	231
11. Applications for Determination of Employee Status.....	231
12. Complaints Under the Occupational Health & Safety Act	231
13. Construction Industry Grievances	231
14. Applications for Reconsideration of Board's Decision	233

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1986

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2478-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moffatt & Powell Limited, (Respondent).

Unit: "all employees of the respondent at Exeter, Ontario, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (5 employees in unit).

2479-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moffatt & Powell (Perth) Limited, (Respondent).

Unit: "all employees of the respondent in Mitchell, Ontario, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in unit).

2480-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moffatt & Powell Limited, (Respondent).

Unit: "all employees of the respondent in Goderich, Ontario, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in unit).

2481-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moffatt & Powell Limited, (Respondent).

Unit: "all employees of the respondent in Strathroy, Ontario, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (18 employees in unit).

2483-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moffatt & Powell Limited, (Respondent).

Unit: "all employees of the respondent in Watford, Ontario, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in unit).

2640-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moffatt & Powell Limited, (Respondent).

Unit: "all employees of the respondent in London, Ontario, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (5 employees in unit).

0465-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. R. Mandel Contracting Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at and out of the Lac Minerals Mine Site, Hemlo, Ontario, save and except foremen and persons above the rank of foreman." (12 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1969-85-R: Christian Labour Association of Canada, (Applicant) v. Maplehurst Hospital Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Thorold, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, office and clerical staff and persons regularly employed for not more than twenty-four (24) hours per week." (36 employees in unit).

2776-86-R: Glass, Pottery, Plastics & Allied Workers International Union, AFL-CIO-CLC, (Applicant) v. Kohler Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed in its plant at Cornwall, Ontario save and except forepersons, persons above the rank of foreperson, office, plant, clerical and sales staff, students employed during the school vacation period and persons regularly employed for twenty-four (24) hours per week or less." (42 employees in unit). (*Having regard to the agreement of the parties*).

0022-86-R: Canadian Paperworkers Union, (Applicant) v. Belkin Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons employed by the respondent in its Belkin Paperboard Division." (28 employees in unit).

0515-86-R: Labourers' International Union of North America, Local 183, (Applicant) v. Peel Condominium Corporation 240, (Respondent).

Unit: "all employees of the respondent working at 200 Robert Speck Parkway, Mississauga, including resident superintendents, save and except the property manager, persons above the rank of property manager, office, clerical and sales staff." (8 employees in unit).

0535-86-R: Energy and Chemical Workers Union, (Applicant) v. Petro-Canada Inc., (Respondent).

Unit #1: "all employees of the respondent at 400 Southdale Road, London, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (2 employees in unit).

Unit #2: "all employees of the respondent at 400 Southdale Road, London, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor." (7 employees in unit).

0606-86-R: United Steelworkers of America, (Applicant) v. Linwo Industries Limited, (Respondent).

Unit: "all employees of Linwo Industries Limited employed at its plant in Agincourt, Ontario, save and except foremen, supervisors, persons above the rank of foreman, office workers and sales staff, trainees designated by the company to fill specialized technical or commercial positions." (134 employees in unit). (*Having regard to the agreement of the parties*).

0666-86-R: Office & Professional Employees International Union, (Applicant) v. Registered Nurses' Association of Ontario, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Department Directors, persons above the rank of Department Director, Executive Assistant to the Executive Director, Senior Secretary to the Executive Director, Bookkeeper & Accountant, Office Manager, registered nurses, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (29 employees in unit).

0795-86-R: United Food and Commercial Workers Union, Local 409, (Applicant) v. G. & L. Nicholetts Enterprises Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent in the Town of Fort Frances, regularly employed for not more than (24) hours per week and students employed during the school vacation period, save and except assistant manager & bookkeeper and persons above the rank of assistant manager & bookkeeper." (6 employees in unit). (*Having regard to the agreement of the parties*).

0728-86-R; 0745-86-R: United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Ideal Railings Ltd., (Respondent).

Unit: "all employees of the respondent working at and out of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, sales and clerical employees." (17 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0815-86-R: Canadian Union of Public Employees, (Applicant) v. South Huron & District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Town of Exeter, save and except senior counsellors, persons above the rank of senior counsellor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the Town of Exeter regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except senior counsellors and persons above the rank of senior counsellor." (20 employees in unit). (*Having regard to the agreement of the parties*).

0835-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (C.A.W. - Canada), (Applicant) v. TecSyn Canada Limited, (Respondent) v. United Steelworkers of America, (Intervener).

Unit: "all employees of the respondent in its Poli-Twine Divisions in Belleville, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (132 employees in unit).

0927-86-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Gen-Auto Shippers Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in Windsor, save and except supervisors, those above the rank of supervisor, secretary to the general manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0942-86-R: United Food and Commercial Workers International Union, (Applicant) v. Wilfrid Laurier University, (Respondent).

Unit: "all employees of the respondent in Waterloo, save and except unit supervisors, those persons above the rank of unit supervisor, office and clerical staff, persons employed in a teaching or academic capacity and

those persons for which any trade union held bargaining rights as of July 7, 1986." (54 employees in unit). (*Having regard to the agreement of the parties*).

0943-86-R: United Food and Commercial Workers International Union, (Applicant) v. General Latex and Chemicals Limited, (Respondent).

Unit: "all employees of the respondent in the City of Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and employees in the bargaining units for which any trade union held bargaining rights as of July 7, 1986." (4 employees in unit). (*Having regard to the agreement of the parties*).

0955-86-R: Ontario Nurses' Association, (Applicant) v. Geraldton District Hospital Inc., (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Geraldton, Longlac and Nakina, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than twenty-four (24) hours per week." (32 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent in Geraldton, Longlac and Nakina regularly employed for not more than twenty-four (24) hours per week, save and except supervisors and persons above the rank of supervisor." (32 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0963-86-R: United Steelworkers of America, (Applicant) v. Basin Custom Machining Ltd., (Respondent).

Unit: "all employees of the respondent in Sudbury save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0970-86-R: Ontario Nurses Association, (Applicant) v. Albright Gardens Homes Incorporated, (Respondent).

Unit #1: (See *Applications for Certification Dismissed Without Vote*).

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than twenty-four (24) hours per week by the respondent at Albright Manor, Beamsville, save and except the Director of Nursing and those persons above the rank of Director of Nursing." (11 employees in unit). (*Having regard to the agreement of the parties*).

0971-86-R: Ontario Nurses' Association, (Applicant) v. Heutinck Nursing Home Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity of Heutinck Nursing Home Limited, (Hilltop Manor Nursing Home), Cambridge, Ontario, save and except Director of Care and persons above the rank of Director of Care." (12 employees in unit). (*Having regard to the agreement of the parties*).

0974-86-R: Canadian Union of Public Employees, (Applicant) v. Thorold Public Library Board, (Respondent).

Unit: "all employees of the respondent in Thorold, Ontario, save and except Chief Librarian, Children's Librarian and persons above such ranks." (17 employees in unit). (*Having regard to the agreement of the parties*).

0984-86-R: Energy and Chemical Workers Union, (Applicant) v. Petro-Canada Inc., (Respondent).

Unit #1: "all service station employees of the respondent at its Mud Lake Road Service Centre at Odessa, save and except shift supervisors, persons above the rank of shift supervisor, persons working in restaurant and food services operations, persons regularly employed for not more than twenty-four (24) hours per week

and students employed during the school vacation period.” (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all service station employees of the respondent at its Mud Lake Road Service Centre at Odessa regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except shift supervisors, persons above the rank of shift supervisor and persons working in restaurant and food services operations.” (9 employees in unit). (*Having regard to the agreement of the parties*).

0985-86-R: Energy and Chemical Workers Union, (Applicant) v. Petro-Canada Inc., (Respondent).

Unit #1: “all service station employees of the respondent at its Highway 401 Service Centre at Napanee, save and except shift supervisors, persons above the rank of shift supervisor, persons working in restaurant and food services operations, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (12 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all service station employees of the respondent at its Highway 401 Service Centre at Napanee, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except shift supervisors, persons above the rank of shift supervisor and persons working in restaurant and food services operations.” (7 employees in unit). (*Having regard to the agreement of the parties*).

0995-86-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Hamelin Group Inc., (Respondent).

Unit: “all employees of the respondent at its Korlin Concentrates Division in Stratford, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (57 employees in unit). (*Having regard to the agreement of the parties*).

1198-86-R: London and District Service Workers’ Union, Local 220, S.E.I.U. - A.F.L. - C.I.O. - C.L.C., (Applicant) v. The London Soap Company Limited, (Respondent).

Unit: “all employees of the respondent in London, Ontario, save and except supervisors, persons above the rank of supervisor, and office and clerical staff.” (26 employees in unit). (*Having regard to the agreement of the parties*).

1204-86-R: Ontario Nurses’ Association, (Applicant) v. Pine Villa Nursing Home Inc., (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in Stoney Creek, Ontario, save and except Director of Nursing and those above the rank of Director of Nursing.” (10 employees in unit). (*Having regard to the agreement of the parties*).

1249-86-R: Labourers’ International Union of North America, Local 607, (Applicant) v. Miller Paving Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (30 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (30 employees in unit).

1294-86-R: London and District Service Workers’ Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Amity Girls Home Incorporated, (Respondent).

Unit: “all employees of the respondent in Kitchener, save and except supervisors, persons above the rank of supervisor, office and clerical staff.” (6 employees in unit). (*Having regard to the agreement of the parties*).

1322-86-R: United Brotherhood of Carpenters and Joiners of America Local 1030, (Applicant) v. 520601 Ontario Ltd., (Respondent).

Unit: "all employees of the respondent in the Township of Thurlow, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (34 employees in unit). (*Having regard to the agreement of the parties*).

1334-86-R: International Union, United Plant Guards Workers of America, Local 1962, (Applicant) v. 656508 Ontario Limited and Gruyich Services Inc., a Limited Partnership, (Respondent).

Unit: "all security guards employed by the respondent at 5200 Robinson St., in Niagara Falls, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor." (2 employees in unit). (*Having regard to the agreement of the parties*).

1335-86-R: International Union, United Plant Guards Workers of America Local 1962, (Applicant) v. 656508 Ontario Limited and Gruyich Services Inc., a Limited Partnership, (Respondent).

Unit: "all security guards employed by the respondent at 5200 Robinson Street in Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours (24) per week and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

1339-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Runnymede Development Corporation Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

1349-86-R: Energy and Chemical Workers Union, (Applicant) v. Petro-Canada Inc., (Respondent).

Unit #1: "all service station employees of the respondent at its Highway 30 Service Centre at Brighton, Ontario, save and except Supervisor, persons above the rank of Supervisor, persons working in restaurant and food services operations, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all service station employees of the respondent at its Highway 30 Service Centre at Brighton, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except Supervisors, persons above the rank of Supervisor and persons working in restaurant and food services operations." (6 employees in unit). (*Having regard to the agreement of the parties*).

1350-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada), (Applicant) v. Medar Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Oshawa, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, technical, engineering, sales staff, persons regularly employed for not

more than twenty-four (24) hours per week and students employed during the school vacation period.” (21 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in Oshawa, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office, clerical, technical, engineering, and sales staff.” (4 employees in unit). (*Having regard to the agreement of the parties*).

1407-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Bruno’s Contracting (Thunder Bay) Ltd., (Respondent).

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same and all construction labourers and truck drivers in the employ of the respondent in the District of Kenora including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (15 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0700-85-R: Ontario Public School Teachers’ Federation, (Applicant) v. The Lakehead Board of Education, (Respondent).

Unit: “all occasional teachers employed by the Lakehead Board of Education in its elementary panel save and except employees in bargaining units for which any trade union held bargaining rights as of June 20th, 1985 being the date of application.” (171 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		170
Number of persons who cast ballots	106	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		97
Number of ballots marked against applicant		6

0029-86-R: Canadian Union of Public Employees, (Applicant) v. St. Joseph’s Health Centre, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener).

Unit: “all lay office and clerical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, section head (Out Patient Accounts), buyers, librarian, secretaries to the Directors of the following departments: Nursing, Public Relations, Materials Management, Health Records, Central Registration, Education and Professional Standards, Social Services, Nutrition Services, Housekeeping Services, Facilities Planning, Pharmacy and Finance, Secretary to persons above the rank of director, persons employed in the Human Resources Department, persons regularly employed for not more than twenty-four hours per week, students employed for the school vacation period, and persons for whom any trade union held bargaining rights as of April 2, 1986.” (205 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters’ list		145
Number of persons who cast ballots	131	
Number of ballots marked in favour of applicant		89
Number of ballots marked against applicant		34
Ballots segregated and not counted		8

0623-86-R: Ontario Public Service Employees Union, (Applicant) v. St. Thomas-Elgin Association for the Mentally Retarded, (Respondent).

Unit: “all employees of the respondent at St. Thomas regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, those persons above the rank of supervisor, Executive Director, Secretary to the Executive Director, office and clerical staff, and Recreation, Leisure Time and Community Services Co-ordinator.” (81 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		77
Number of persons who cast ballots	37	
Number of ballots marked in favour of applicant		20
Number of ballots marked against applicant		17

0691-86-R: Canadian Brotherhood of Railway, Transport & General Workers, (Applicant) v. Northridge Plastics Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Gosfield North, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, students employed during the school vacation period and persons employed for not more than twenty-four (24) hours per week." (30 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	26	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		10

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0499-86-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Red Oak Limited Partnership, (Respondent).

Unit: "all employees of the respondent employed for not more than twenty-four hours per week and students employed during the school vacation period in Peterborough, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff and those employees in bargaining units for which any trade union held bargaining rights as of May 20, 1986." (26 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		25
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		0

0873-86-R: Labourers' International Union of North America, Local 837, (Applicant) v. 392602 Ontario Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 2892 Oakdale Avenue, St. Catharines, Ontario, including resident superintendents, save and except managers and persons above the rank of manager." (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		0

Applications for Certification Dismissed Without Vote

2480-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moffatt & Powell Limited, (Respondent). (6 employees in unit).

Unit #1: (*See Bargaining Agents Certified Without Vote*).

2481-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moffatt & Powell Limited, (Respondent). (18 employees in unit).

Unit #2: (*See Bargaining Agents Certified Without Vote*).

3031-85-R: Canadian Union of Public Employees, (Applicant) v. Le Conseil Des Ecoles Catholiques De Prescott-Russell, The Prescott and Russell County Roman Catholic Separate School Board, (Respondent). (17 employees in unit).

0243-86-R: Union Workers of Manufacturing Products and Office Personnel, (Applicant) v. Mercedes Textiles Limited, (Respondent) v. International Woodworkers of America, (Intervener). (15 employees in unit).

0250-86-R: Christian Labour Association of Canada, (Applicant) v. Classis Hamilton Homes for the Aged Inc. - Shalom Manor, (Respondent) v. Group of Employees, (Objectors). (56 employees in unit).

Unit #2: (See *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

0686-86-R: The Canadian Union of Public Employees, (Applicant) v. Orthopaedic & Arthritic Hospital, (Respondent) v. Group of Employees, (Objectors). (104 employees in unit).

0843-86-R: Ontario Secondary School Teachers' Federation, (Applicant) v. Board of Governors of Alama College, (Respondent). (36 employees in unit).

0970-86-R: Ontario Nurses Association, (Applicant) v. Albright Gardens Homes Incorporated, (Respondent). (16 employees in unit).

Unit #2: (See *Bargaining Agents Certified Without Vote*).

1209-86-R: United Steelworkers of America, (Applicant) v. Benson Spring Service Limited (Operating as Jiffy Muffler), (Respondent). (15 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0517-84-R: Ontario Public Service Employees Union, (Applicant) v. The Board of Education for the Borough of East York, (Respondent).

Unit: "all occasional teachers employed by the respondent in its secondary school panel in the Municipality of Metropolitan Toronto, save and except persons covered by subsisting collective agreements." (112 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		30

0713-86-R: United Food & Commercial Workers' International Union, Local 175, AFL-CIO-CLC, (Applicant) v. Protein Foods Canada Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Paris, save and except supervisors, persons above the rank of supervisor, office and clerical staff, nursing staff, employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (225 employees in unit).

Number of names of persons on list as originally prepared by employer		252
Number of persons who cast ballots	202	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		192
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		49
Number of ballots marked against applicant		142
Ballots segregated and not counted		10

0939-86-R: Ontario Public Service Employees Union, (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario operating St. Joseph's Hospital at Sarnia, Ontario, (Respondent).

Unit: "all lay paramedical employees of the respondent at Sarnia, Ontario, save and except supervisors, those above the rank of supervisor and employees for whom any trade union held bargaining rights as of July 4, 1986." (82 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		89
Number of persons who cast ballots	71	
Number of ballots marked in favour of applicant		22
Number of ballots marked against applicant		43

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2874-85-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Claiborne Industries Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent at its Rocamora Brothers Canada Division, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, outside sales staff, and persons covered by subsisting collective collective agreements." (29 employees in unit).

Number of names of persons on revised voters' list		17
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		12

0250-86-R: Christian Labour Association of Canada, (Applicant) v. Classis Hamilton Homes for the Aged Inc. - Shalom Manor, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See *Applications for Certification Dismissed Without Vote*).

Unit #2: "all employees of the respondent at Grimsby, Ontario regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff." (27 employees in unit).

Number of names of persons on revised voters' list		31
Number of persons who cast ballots	29	
Number of segregated ballots cast by persons whose name appear on voters' list	1	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		18
Ballots segregated and not counted		1

0369-86-R: Labourers' International Union of North America Ontario Provincial District Council, (Applicant) v. Walloy Excavating Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (28 employees in unit).

Number of names of persons on list as originally prepared by employer		34
Number of persons who cast ballots	30	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		29

Number of segregated ballots cast by persons whose name appear on voters' list	1	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		22
Ballots segregated and not counted		1

0400-86-R: Ontario Nurses' Association, (Applicant) v. Hanover and District Hospital, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Hanover, save and except Head Nurses, persons above the rank of Head Nurse and those regularly employed for not more than twenty-four (24) hours per week." (14 employees in unit).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		7

0795-86-R: United Food and Commercial Workers Union, Local 409, (Applicant) v. G. & L. Nicholetts Enterprises Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Town of Fort Frances, save and except assistant manager & bookkeeper, persons above the rank of assistant manager & bookkeeper, persons regularly employed for not more than (24) hours per week and students employed during the school vacation period." (6 employees in unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		3

Unit #2: (See *Bargaining Agents Certified Without Vote*).

Applications for Certification Withdrawn

1006-86-R: Office & Professional Employees Int. Union, (Applicant) v. Lakehead University, (Respondent).

1196-86-R: Service Employees International Union Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Peel Memorial Hospital, (Respondent).

1203-86-R: Ontario Nurses' Association, (Applicant) v. Sudbury General Hospital (Killarney Nursing Station), (Respondent).

1336-86-R: United Steelworkers of America, (Applicant) v. Hartford Fibres Ltd., (Respondent).

1386-86-R: Textile Processors, Service Trades, Health Care, Technical and Professional Employees International Union Local 351, (Applicant) v. The Westin Hotel, (Respondent).

1387-86-R: Textile Processors, Service Trades, Health Care, Technical and Professional Employees International Union Local 351, (Applicant) v. The Westin Hotel, (Respondent).

1418-86-R: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. L.E.M. Renovations Ltd., (Respondent).

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

0752-86-FC: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, (Applicant) v. Teledyne Industries Canada Limited, (Respondent). (*Withdrawn*).

1258-86-FC: United Food and Commercial Workers International Union AFL, CIO, CLC, (Applicant) v. ABC Electro Powdercoating Limited, (Respondent). (*Withdrawn*).

SALE OF A BUSINESS

0154-86-U: United Steelworkers of America, (Applicant) v. G. K. L. Industries Limited, (Respondent). (*Withdrawn*).

0578-86-R: Retail, Wholesale and Department Store Union, Local 414 AFL-CIO-CLC, (Applicant) v. Onofrio Ferlisi Supermarket (Burnanthurpe) Limited, c.o.b. as Target Farms, (Respondent). (*Withdrawn*).

UNION SUCCESSOR RIGHTS

0892-86-R: International Union of Bricklayers and Allied Craftsmen, Local 10, (Applicant) v. Masonry Industry Employers Council of Ontario Terrazzo, Tile and Marble Guild of Ontario, Inc., (Respondent). (*Granted*).

0893-86-R: International Union of Bricklayers and Allied Craftsmen, Local 7, (Applicant) v. Masonry Industry Employers Council of Ontario Terrazzo, Tile and Marble Guild of Ontario Inc., (Respondent). (*Granted*).

0894-86-R: International Union of Bricklayers and Allied Craftsmen, Local 6, (Applicant) v. Masonry Industry Employers Council of Ontario Terrazzo, Tile and Marble Guild of Ontario, Inc., (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3220-85-R: Keith Payne, et al, (Applicant) v. Canadian Brotherhood of Railway, Transport & General Workers, (Respondent). (*Granted*).

3221-85-R: Michael C. Szabo, Jurgen L. Hasse, Dale A. Lambert, Kim J. Sheffield, (Applicants) v. Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen, Local 23, (Respondents) v. Fred Jantz Masonry Construction Company Limited, (Intervener). (*Granted*).

3234-85-R: George Ivaniski, (Applicant) v. United Food and Commercial Workers International Union, Local 175, AFL-CIO-CLC, (Respondent) v. Robin Hood Multifoods Inc., Glassgoods Division, (Intervener). (*Dismissed*).

0269-86-R: Peter Kunkel (Full-Time employees of R.L.D. Electric), (Applicant) v. International Brotherhood of Electrical Workers, Local 353, (Respondent) v. 618830 Ontario Ltd. c.o.b. as R.L.D. Electric, (Intervener). (*Dismissed*).

0337-86-R: Donald W. Houghton, (Applicant) v. United Food and Commercial Workers Union Local 633, (Respondent).

Unit: "all full-time employees employed at its food store in the Meat Department, Niagara Falls, Ontario, save and except Meat Manager and persons above the rank of Meat Manager, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (2 employees in unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

0348-86-R: Frank Belvedere, (Applicant) v. Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Wire World Industries Limited, (Intervener).

Unit: "all employees of Wire World Industries Limited at Concord, Ontario, save and except foremen, persons above the rank of foreman, office, sales and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in unit).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	17	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		16

0351-86-R: Alan Gagnon, (Applicant) v. International Union of Operating Engineers, Local 793, (Applicant). (*Dismissed*).

0358-86-R: Andre Souigny on behalf of himself and other employees, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 93, (Respondent) v. Doran Contractors Limited, (Intervener). (*Dismissed*).

0359-86-R: Employees of Sears Canada Inc., (Peterborough), (Applicant) v. Retail, Wholesale & Department Store Union, (Respondent) v. Sears Canada Inc., (Intervener). (*Dismissed*).

0361-86-R: Gary Cudney, (Applicant) v. Sheet Metal Workers' International Association Local 504, (Respondent) v. Biscombe Enterprises Inc., (Intervener).

Unit: "all journeymen and apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario." (6 employees in unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		5

0362-86-R: Michel LeBlanc, (Applicant) v. Sudbury Mine Mill Smelter Workers Union Local 598, (Respondent Union) v. Mansour Rockbolting Limited & Mansour Mining Equipment Supply and Repair Inc., (Respondent Employers). (*Dismissed*).

0764-86-R: Brian Lahn for a group of employees, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 527, (Respondent). (*Granted*).

0825-86-R: James Good, (Applicant) v. United Food & Commercial Workers International Union, (Respondent). (*Dismissed*).

0832-86-R: Matt Trevithick, (Applicant) v. International Brotherhood of Electrical Workers Local 353, (Respondent) v. Beam Electric Co. Ltd., (Intervener). (*Granted*).

0844-86-R: Emile Janveau, (Applicant) v. Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1269-82-U; 0195-83-U: Luciano D'Alessandro and Donato Marinaro, (Complainants) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, (Respondents). (*Granted*).

- 1864-84-U:** United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Nepean Roof Truss Limited, (Respondent). (*Granted*).
- 2146-84-U; 2413-84-U:** United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Nepean Roof Truss Limited, (Respondent). (*Dismissed*).
- 2944-84-U:** Unal Duran, (Complainant) v. Ontario Hydro Employees Union, C.U.P.E. Local 1000, (Respondent) v. Ontario Hydro, (Intervener). (*Dismissed*).
- 0480-85-U; 0481-85-U:** The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Applicant/Complainant) v. Nepean Roof Truss Limited, (Respondent). (*Dismissed*).
- 0521-85-U:** International Union of Operating Engineers, Local 793, (Complainant) v. R. Mandel Contracting Ltd., (Respondent). (*Dismissed*).
- 0588-85-U:** International Union of Operating Engineers, Local 793, (Complainant) v. R. Mandel Contracting Ltd., (Respondent). (*Dismissed*).
- 2491-85-U:** Christian Labour Association of Canada, (Complainant) v. Maplehurst Hospital Limited, (Respondent). (*Granted*).
- 2829-85-U:** The Canadian Red Cross Society Blood Transfusion Service, (Complainant) v. The Canadian Red Cross Blood Transfusion Service Employees Association, (Respondent). (*Withdrawn*).
- 3043-85-U:** Mr. Norm Richard and Mr. Gilles Sevegny, (Complainants) v. Local 128 Boilermaker's Union, (Respondent). (*Dismissed*).
- 3077-85-U:** Lilian Miskic, (Complainant) v. United Automobile, Aerospace, Agricultural Implement Workers of America, Local 1520, (Respondent) v. Ford Motor Company of Canada Limited, (Intervener). (*Dismissed*).
- 0081-86-U:** McKellar General Hospital, (Complainant) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*).
- 0101-86-U:** United Food & Commercial Workers International Union, (Complainant) v. ABC Electro Powder Coating Limited, (Respondent). (*Withdrawn*).
- 0285-86-U:** Duncan A. Carmichael, Aurele J. Blais, Howard Brooks, (Complainants) v. Employees of Association of Computing Devices Co., (Respondent). (*Dismissed*).
- 0304-86-U:** Canadian Union of Public Employees, Local 794, (Complainant) v. The Hamilton Civic Hospitals, (Respondent). (*Withdrawn*).
- 0323-86-U:** Labourers' International Union of North America, Local 183, (Complainant) v. 518270 Ontario Limited, (Respondent). (*Withdrawn*).
- 0474-86-U:** Great Lakes Fishermen and Allied Workers' Union, Domingos Belo and Jose Gandaio, (Complainants) v. North Shore Fishery Inc., (Respondent). (*Withdrawn*).
- 0503-86-U:** Fouad Mishriky (Fred), Paul Latimer, (Complainants) v. The U.A.W. Local Union 1032, (Respondent) v. Dresser Canada Inc., (Intervener). (*Dismissed*).
- 0510-86-U:** Edward J. Pizunski, (Complainant) v. Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent). (*Dismissed*).

0553-86-U: CBoodram Rompersaud, (Complainant) v. W. Heeley and Canadian Auto Workers, Local 303, (Respondent) v. Pitman Manufacturing Co. Inc., (Intervener). (*Dismissed*).

0580-86-U: United Steelworkers of America, (Complainant) v. Walter Tool and Die Ltd., (Respondent). (*Granted*).

0594-86-U: Michel Lalonde, (Complainant) v. Local 597 Labourers' International Union of North America, (Respondent). (*Withdrawn*).

0632-86-U: United Steelworkers of America, (Complainant) v. Erwin Walter, (Respondent). (*Granted*).

0668-86-U: Ontario Nurses' Association, (Complainant) v. Grace General Hospital and Ontario Hospital Association, (Respondents). (*Withdrawn*).

0761-86-U: Richard Szabo, (Complainant) v. Labourer's Union Local 1267, Oil & Gas Technicians, Service, Domestic & General Workers Union, (Respondent). (*Withdrawn*).

0883-86-U: Margaret-Anne Horgan, (Complainant) v. Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

0926-86-U: Patrick Murphy, (Complainant) v. C.U.P.E. Local 778, (Respondent). (*Withdrawn*).

0944-86-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Honest Ed's Limited, (Respondent). (*Withdrawn*).

0951-86-U: Labourers' International Union of North America, Local 493, (Complainant) v. Mayco Homes North Bay Ltd., (Respondent). (*Withdrawn*).

0960-86-U: Ontario Nurses' Association, (Complainant) v. Riverside Hospital of Ottawa, and Ontario Hospital Association, (Respondents). (*Withdrawn*).

0966-86-U: Service Employees Union, Local 210, (Complainant) v. Salvation Army Grace Hospital, (Respondent). (*Withdrawn*).

0967-86-U: Brick Brewing Co. Limited, (Complainant) v. United Food and Commercial Workers International Union (Local 173) formerly Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Local 173), (Respondent). (*Withdrawn*).

0978-86-U: Canadian Union of Public Employees, Locals 1582, 1806 and 2758, (Complainant) v. Metropolitan Toronto Library Board, (Respondent). (*Withdrawn*).

0997-86-U: Canadian Automatic Sprinkler Association, (Complainant) v. T. F. Wilson Fire Protection Ltd., (Respondent). (*Withdrawn*).

1007-86-U: Michel S. Gauthier, (Complainant) v. Hugo Rossini & Labourers' International of North America, Michael A. Ross & Labourers' International of North America, Local 493, Jerry Lozynski & Marine Pipeline Construction of Canada Ltd., (Respondents). (*Withdrawn*).

1008-86-U: Len F. Gauthier, (Complainant) v. Hugo Rossini & Labourers' International of North America, Michael A. Ross & Labourers' International of North America, Local 493, Jerry Lozynski & Marine Pipeline Construction of Canada Ltd., (Respondent). (*Withdrawn*).

1190-86-U: Office & Professional Employees International Union, (Complainant) v. University & College Credit Union, (Respondent). (*Withdrawn*).

1193-86-U: United Brotherhood of Carpenters and Joiners of America, Local 27, (Complainant) v. Prestige Office Interiors Limited, (Respondent). (*Withdrawn*).

1213-86-U: National Automobile, Aerospace and Agricultural Implement Workers of Canada (C.A.W. - Canada), (Complainant) v. Kapco Tool & Die Limited, (Respondent). (*Withdrawn*).

1217-86-U: Union and Bank Employees Local 2104 (Ontario) CLC, (Complainant) v. National Trust, (Respondent). (*Withdrawn*).

1228-86-U: Joe Faria, (Complainant) v. Hudson Bay Diecasting Limited, (Respondent). (*Withdrawn*).

1232-86-U: United Plant Guard Workers of America Local 1962, (Complainant) v. York University, (Respondent). (*Withdrawn*).

1241-86-U: James Stirling, (Complainant) v. United Tire & Rubber URW 687, (Respondent). (*Withdrawn*).

1262-86-U: Labourers' International Union of North America, (Complainant) v. Miller Paving Limited, (Respondent). (*Withdrawn*).

1266-86-U: United Food and Commercial Workers International Union, (Complainant) v. Herman Miller Canada Inc., (Respondent). (*Withdrawn*).

1328-86-U: London and District Service Workers' Union Local 220, (Complainant) v. London Soap Company Ltd., (Respondent). (*Withdrawn*).

1340-86-U: London and District Service Workers' Union, Local 220, S.E.I.U. - A.F.L. - C.I.O. - C.L.C., (Complainant) v. London Soap Company Ltd., (Respondent). (*Withdrawn*).

1344-86-U: William Henry Cleaveley, (Complainant) v. United Brotherhood of Carpenters Local 8679, (Respondent). (*Withdrawn*).

1348-86-U: Hamilton Automatic Vending Company Limited, (Complainant) v. Mrs. Joan Gilchrist, President, Local 576, United Cement, Lime, Gypsum and Allied Workers Division of the Boilermakers Union, (Respondent). (*Withdrawn*).

1383-86-U: Doug Surh, (Complainant) v. Bakery, Confectionery & Tobacco Workers International Local 181, (Respondent). (*Dismissed*).

1394-85-U: Francisco Ferreira, (Complainant) v. Dufferin Roofing Limited, (Respondent). (*Dismissed*).

1442-86-U: Canadian Union of Public Employees, Local 2204, (Complainant) v. Children's Castle Day Care, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0480-85-U; 0481-85-U: The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainants) v. Nepean Roof Truss Limited, (Respondent). (*Dismissed*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

1191-86-M: Rita Wilpstra, (Applicant) v. Service Employees International Union #210, (Respondent Trade Union) v. Charlotte Eleanor Englehart Hospital, Petrolia, Ontario, (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0811-86-M: Morton Tobacco Limited, (Employer) v. Retail, Wholesale and Department Store Union, (Trade Union). (*Granted*).

0924-86-M: Labourers' International Union of North America, Local 1089, (Applicant) v. M. Alzner Contractors Limited, (Respondent). (*Withdrawn*).

JURISDICTIONAL DISPUTES

3068-85-JD: Canadian Paperworkers' Union CLC and its Rainy Lake Local 306, (Complainant) v. Boise Cascade Canada Ltd., Fort Frances Paper Division, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2832-85-M: London and District Service Workers' Union, Local 220, (Applicant) v. Maplewood Nursing Home Ltd., (Respondent). (*Granted*).

3235-85-M: Service Employees Union Local 183/663, (Applicant) v. Lennox & Addington County Hospital, (Respondent). (*Withdrawn*).

0388-86-M: Victoria Hospital Corporation, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0618-86-OH: Jacques G. Chamchoumis, (Complainant) v. Mr. Joseph Tanenbaum, Owner Titan Proform Company Ltd., (Respondent). (*Withdrawn*).

1379-86-OH: Shirley Margaret Ellis, (Complainant) v. St. Clair Tool & Die, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

0118-86-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93 and Richard Restall, (Applicants) v. Ottawa-Carleton Bricklaying and Masonry Limited, (Respondent). (*Granted*).

0227-86-M: The Hamilton Spectator, (Applicant) v. Southern Ontario Newspaper Guild Local 87, (Respondent). (*Withdrawn*).

0242-86-M; 0969-86-M: Sheet Metal Workers International Association, Local Union 30, (Applicant) v. Dufferin Roofing Limited, (Respondent). (*Granted*).

0271-86-M: Local 1891 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Crystal Painting Contractors Ltd., Rino Zanatta Painting Contractors Ltd., (Respondents). (*Withdrawn*).

0314-86-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Belmont Plastering Company, (Respondent). (*Withdrawn*).

0722-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. Colautti Construction Limited, (Respondent). (*Dismissed*).

0816-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 800, (Applicant) v. Goldbelt Construction Ltd., (Respondent). (*Granted*).

0851-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Metropolitan Toronto Apartment Builders Association and Milne Nicholls Limited, (Respondent). (*Withdrawn*).

0979-86-M: United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. 593601 Ontario Limited, (Respondent). (*Granted*).

1001-86-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Joe Arban Contractor Limited, (Respondent). (*Withdrawn*).

1010-86-M: Labourers' International Union of North America, (Applicant) v. Pilan Properties Ltd., (Respondent). (*Withdrawn*).

1011-86-M; 1303-86-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172, (Applicant) v. Neath Toronto Ltd., (Respondent). (*Granted*).

1186-86-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Alstate Drywall Systems Limited, (Respondent). (*Granted*).

1195-86-M: United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. A. C. Joe Bancheri Carpentry, (Respondent). (*Granted*).

1253-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Welcon Ltd., (Respondent). (*Granted*).

1257-86-M: Sheet Metal Workers International Association, Local 30, (Applicant) v. Bothwell Accurate Limited, (Respondent). (*Withdrawn*).

1264-86-M: Labourers' International Union of North America, (Applicant) v. Status Framing Inc., (Respondent). (*Withdrawn*).

1307-86-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Brent-Reg Construction Ltd., (Respondent). (*Withdrawn*).

1308-86-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 31, Canada, (Applicant) v. Noranda Tile Co. Ltd., Noranda Renovation Contracting and Noranda Renovation and Ceramic Tile Setting Co. Ltd., (Respondents). (*Granted*).

1341-86-M: Labourers' International Union of North America, (Applicant) v. A. V. Curb and Sidewalk, (Respondent). (*Withdrawn*).

1351-86-M: Local 1795 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. St. Catharines Glass & Mirror (Niagara) Ltd., (Respondent). (*Granted*).

1356-86-M: Labourers' International Union of North America, Local 837, (Applicant) v. Jaddco Anderson Limited, (Respondent). (*Withdrawn*).

1375-86-M: Labourers' International Union of North America, Local 837, (Applicant) v. Delta Ready Mix, (Respondent). (*Granted*).

1377-86-M: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Bersha Installations Mark Andre Bertrand, (Respondents). (*Withdrawn*).

1395-86-M: Labourers' International Union of North America, Local 1059, (Applicant) v. J-AAR Excavating Limited, (Respondent). (*Withdrawn*).

1402-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Wiggins Mechanical Contractors Ltd., (Respondent). (*Withdrawn*).

1403-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of

the United States and Canada, Local 46, (Applicant) v. Gerrard Mechanical Services Ltd., (Respondent). (*Withdrawn*).

1404-86-M: The International Association of Bridge, Structural and Ornamental Iron Workers Local 721, (Applicant) v. Jervis B. Webb Co. of Canada Ltd., (Respondent). (*Withdrawn*).

1421-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. F. T. Construction, (Respondent). (*Withdrawn*).

1423-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Gubert Construction Limited, (Respondent). (*Withdrawn*).

1424-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Tony Dimonte Drainage Ltd., (Respondent). (*Withdrawn*).

1425-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. All Star Carpentry, (Respondent). (*Withdrawn*).

1440-86-M: Labourers' International Union of North America, Local 527, (Applicant) v. Amantea Masonry Contractors, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0009-86-R: United Steelworkers of America, (Applicant) v. Capital Disposal Equipment Inc., (Respondent) v. Group of Employees, (Objectors). (*Denied*).

0343-86-R: Diane Raymond, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. Hawkesbury Villa, (Intervener). (*Denied*).

0344-86-R: Johanne Plante, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. Hawkesbury Villa, (Intervener). (*Denied*).

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